TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 196.

CAROLYN FOSTER STICKNEY, AS EXECUTRIX, AND ROBERT I. JENKS AND JOHN G. HANNAH, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF JOSEPH STICKNEY, DECEASED, AND CAROLYN FOSTER STICKNEY, INDIVIDUALLY AND AS WIDOW AND DEVISEE, PLAINTIFFS IN ERROR,

vs.

OTTO KELSEY, COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE SURROGATE'S COURT IN AND FOR THE COUNTY OF NEW YORK, STATE OF NEW YORK.

FILED JANUARY 13, 1907.

(20,523.)

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a Court of Appeals, State of New York.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

CAROLYN FOSTER STICKNEY, as Executrix, and ROBERT I. JENKS and JOHN G. HANNAH, as Executors, of the Last Will and Testament of Joseph Stickney, Deceased, and CAROLYN FOSTER STICKNEY, in Her Individual Capacity and as Widow and Devisee, Appellants.

OTTO KELSEY, Comptroller of the State of New York, Respondent.

Papers on Appeal.

Mitchell & Mitchell, Attorneys for Appellants, 44 & 46 Wall Street, Borough of Manhattan, New York City.

Edward H. Fallows, Attorney for Respondent, Comptroller of the State of New York, 170 Broadway, Borough of Manhattan, New York City.

1 Court of Appeals.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

CAROLYN FOSTER STICKNEY, as Executrix, and ROBERT I. JENKS and JOHN G. HANNAH, as Executors, of the Last Will and Testament of Joseph Stickney, Deceased, and CAROLYN FOSTER STICKNEY, in Her Individual Capacity and as Widow and Devisee, Appellants.

OTTO KELSEY, Comptroller of the State of New York, Respondent.

Statement.

This is an appeal by the executrix and devisee of the decedent from an order of the Surrogate's Court, which affirmed an order of the Surrogate fixing a tax on the real property devised to the widow.

2 The devise of real property to the widow in this case would not have been a taxable transfer prior to Chapter 41 of the Laws of 1903.

The appellants claim that this act is unconstitutional.

The respondent claims that this act is constitutional.

There has been no change in parties, or attorneys, in this proceeding.

From the order affirming the order fixing the tax this appeal is taken.

3 *Report of James Yereance, Appraiser.*

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4 *Order Appointing Appraiser.*

At a Surrogate's Court, held in and for the County of New York, at the County Court House in The City of New York, on the 14th day of April 1904.

Present: Hon. Frank T. Fitzgerald, Surrogate.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

On reading and filing the petition of Carolyn Foster Stickney, Robert I. Jenks and John G. Hannah, Executors of the Last Will of said decedent, I do hereby, pursuant to the requirement of Chapter 658 of the Laws of 1900, direct James Yereance, Esq., one of the appraisers appointed by the State Comptroller under said statute, to fix the fair market value of the property which was of the above-named decedent and which is subject to the payment of any tax imposed by Article X, Chapter 908, Laws of 1896, and the Acts amendatory thereof and supplementary thereto.

FRANK T. FITZGERALD, *Surrogate.*

5 *Petition for Appointment of Appraiser.*

Surrogate's Court, County of New York.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

To the Surrogate's Court of the County of New York:

The petition of Carolyn Foster Stickney, Robert I. Jenks and John G. Hannah respectfully shows:

First. That your petitioners are the Executors of the Last Will and Testament of Joseph Stickney, deceased, and as such persons interested in the estate of the said deceased.

Second. That the said decedent departed this life on the twenty-first day of December, 1903, at No. 874 Fifth Avenue, Borough of Manhattan, N. Y. City; that the said deceased was a resident of No. 874 Fifth Avenue, Borough of Manhattan, N. Y. City.

Third. That letters testamentary on the estate of said deceased were, on the twenty-ninth day of December, 1903, issued to your petitioners by the Surrogate's Court of the County of New York, and that their post-office address is No. 1 Broadway, Borough of Manhattan, N. Y. City.

Fourth. That, as your petitioners are informed and believe, the property of said decedent, or some portion thereof or some interests therein, is or may be subject to the payment of the tax imposed by the law in relation to taxable transfers of property.

Fifth. That all persons who are interested in said estate
6 and who are entitled to notice of all proceedings herein, and their post-office addresses, are as follows:

The Comptroller of the State of New York, Albany, N. Y.

	Relationship.	
Carolyn Foster Stickney..	Widow..	No. 874 Fifth Avenue, Borough of Manhattan, City of New York.
Mary T. Stickney	None ...	No. 20 East Mount Vernon Place, City of Baltimore, State of Maryland.
Ella T. Stickney.....	Niece....	No. 20 East Mount Vernon Place, City of Baltimore, State of Maryland.
Harriet S. Jenks.....	Cousin..	Concord, New Hampshire.
Rebecca L. Armington...	"	Chatham, Massachusetts.
Olivia G. Moulton.....	"	Concord, New Hampshire.
Charles S. Boardman	"	Concord, New Hampshire.
Lucretia S. Waterman ...	"	Newburyport, Massachusetts.
Charles F. Osgood.....	"	No. 30 Green Street, Concord, New Hampshire.

Robert C. Osgood	Cousin.	
Mark J. Osgood	"	
Herbert S. Osgood	"	
Lillian A. Osgood	"	
Charles F. Osgood	"	
Children of Herbert S. Osgood, deceased, residing with their mother Lillian J. Osgood	.....	Claremont, New Hampshire.

7

John G. Moran, Son of Mary Jane Moran, deceased.	Cousin..	No. 733 Quincy Street, Borough of Brooklyn, City of New York
Albert C. Gibson	"	Brooklyn, N. Y.
B. Walker Peterson	"	Wheeling, West Virginia.
Mary F. Gibson	"	Concord, New Hampshire.
Ruth A. Gibson	"	No. 144 East 37th Street, Borough of Manhattan, City of New York.
Adelaide M. Gibson	Cousin..	No. 144 East 37th Street, Borough of Manhattan, City of New York.
Mary T. Gibson	"	No. 144 East 37th Street, Borough of Manhattan, City of New York.
Cora I. Gibson	"	No. 144 East 37th Street, Borough of Manhattan, City of New York.
George B. Osgood	"	No. 127 West 58th Street, Borough of Manhattan, City of New York.
Lucretia O. Bailey	"	No. 66 East 77th Street, Borough of Manhattan, City of New York.
Mary L. J. Paige	"	Baldwinsville, Massachusetts.
Allen M. Jenks	"	No. 315 West 55th Street, Borough of Manhattan, City of New York.

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Robert I. Jenks	Cousin..	No. 35 East 65th Street, Borough of Manhattan, City of New York.
The Home for Friendless Children of Wilkesbarre, Pennsylvania	.....	Wilkesbarre, Pennsylvania.
The Wilkesbarre City Hospital	.....	Wilkesbarre, Pennsylvania.
The Centennial Home for the Aged of Concord, New Hampshire	.....	Concord, New Hampshire.

The Margaret Pillsbury General Hospital of Concord, New Hampshire	Concord, New Hampshire.
The Charity Organization Society of the City of New York	No. 105 East 22nd Street, Borough of Manhattan, City of New York.

That all the above named are of full age and sound mind, except:

Robert C. Osgood, infant over fourteen years of age.

Mark J. Osgood, Herbert S. Osgood, Lillian A. Osgood, Charles F. Osgood } Infants under fourteen years of age.

Wherefore your petitioner- prays that you will designate an appraiser, as provided by law.

Dated New York, Ap'l 12, 1904.

(S'd) CAROLYN F. STICKNEY,
ROBERT I. JENKS,
JOHN G. HANNAH,
Petitioners.

9 STATE OF NEW YORK, *County of New York, ss:*

Carolyn Foster Stickney, being duly sworn, deposes and says: That she is one of the petitioners herein; that she has read the foregoing petition subscribed by her and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters she believes it to be true.

CAROLYN F. STICKNEY.

Sworn to before me, this 12th day of April, 1904.

SILAH L. BENNETT,
Notary Public, Westchester Co.

Ctf. filed in N. Y. Co.

STATE OF NEW YORK, *County of New York, ss:*

Robert I. Jenks and John G. Hannah being duly sworn, doth depose and say each for himself that he is one of the petitioners herein; that he has read the foregoing petition subscribed by him and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

ROBERT I. JENKS.
JOHN G. HANNAH.

Sworn to before me this 13th day of April, 1904.
LEON MALRAISON,
Notary Public, New York County, New York.

10 *Notice of Appraisal.*

Surrogate's Court, County of New York.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers, of the Property of JOSEPH STICKNEY, Deceased.

You will please take notice that by virtue of an order of Hon. Frank T. Fitzgerald, one of the Surrogates of the County of New York, made and dated the 14th day of April, 1904, and pursuant to provisions of Chapter 908 of the Laws of 1896, relating to Taxable Transfers of property, and the acts amendatory thereof I shall on the 7th day of June, 1904, at 10.30 o'clock in the forenoon of that day at Room No. 1401, Home Life Building, Nos. 256 & 257 Broadway, in the Borough of Manhattan, City of New York, proceed to appraise at its fair market — all the property of said Joseph Stickney deceased late of New York passing by his last will and testament which is subject to the payment of the tax imposed by the said Act and the acts amendatory thereof.

And such of you as are hereby notified as are under the age of twenty one years are required to appear by your guardian if you have one, or, if you have none, to appear and apply for one to be appointed, or in the event of your neglect or failure to do so,
11 a guardian will be appointed by the Surrogate to represent and act for you in the proceeding.

New York May 12th, 1904.

JAMES YEREANCE, *Appraiser.*

To Hon. Edward H. Fallows:
Attorney for State Comptroller, 170 Broadway, Manhattan, New York.
Mitchell & Mitchell,
Attorneys for Petitioners, 44 & 46 Wall Street, Manhattan, New York.
Carolyn Foster Stickney,
874 Fifth Avenue, Manhattan, New York.
Mary T. Stickney,
20 East Mount Vernon Place, Baltimore, Maryland.
Ella T. Stickney,
20 East Mount Vernon Place, Baltimore, Maryland.
Harriet S. Jenks
Olivia C. Moulton } Concord, New Hampshire.
Charles S. Boardman
Rebecca L. Armington,
Chatham, Massachusetts.
Lucretia S. Waterman,
Newburyport, Massachusetts.

To Charles F. Osgood,
30 Green Street, Concord, New Hampshire.
Robert C. Osgood,
Mark J. Osgood,
Herbert S. Osgood,
Lillian A. Osgood,
Charles F. Osgood,
Claremont, New Hampshire.
John G. Moran,
733 Quincy Street, Brooklyn, New York.
Albert C. Gibson,
Brooklyn, New York.
B. Walker Peterson,
Wheeling, West Virginia.
Mary F. Gibson,
Concord, New Hampshire.

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Ruth A. Gibson,
144 East 37th Street, Manhattan, New York.
Adelaide M. Gibson
Mary T. Gibson
Cora I. Gibson
144 East 37th Street, Manhattan, New York.
George B. Osgood,
127 West 58th Street, Manhattan, New York.
Lucretia O. Bailey,
66 East 78th Street, Manhattan, New York.
Mary L. J. Paige,
Baldwinsville, Massachusetts.
Allen M. Jenks,
315 West 55th Street, Manhattan, New York.
Robert I. Jenks,
35 East 65th Street, Manhattan, New York.
The Home for Friendless Children of Wilkesbarre, Pennsylvania.
Wilkesbarre, Pennsylvania.
The Wilkesbarre City Hospital,
Wilkesbarre, Pennsylvania.
The Centennial Home for the Aged of Concord, New Hampshire.
Concord, New Hampshire.
The Margaret Pillsbury General Hospital of Concord, New Hampshire,
Concord, New Hampshire.
The Charity Organization Society of the City of New York,
105 East 22nd Street, Manhattan, New York.
John G. Hannah,
1 Broadway, Manhattan, New York.

CITY AND COUNTY OF NEW YORK, *ss.:*

Louis J. Schwartz, a Clerk in the Transfer Tax Appraisers' Office, being duly sworn says, that he is over 18 years of age, and that on the 12th day of May 1904, he deposited in the Post Office at the

City of New York, a copy of the foregoing notice, contained
13 in securely closed post-paid Wrappers, directed to each of the above mentioned persons, respectively, at the address set opposite their names, being all the persons known to have or claim an interest in the property passing by the will of Joseph Stickney, which is subject to the payment of the tax imposed by the said acts.

LOUIS J. SCHWARTZ.

Sworn to before me May 14, 1904.
JAS. YEREANCE, *Appraiser.*

Affidavit of Robert I. Jenks, Verified May 9, 1904.

Surrogate's Court, County of New York.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

STATE OF NEW YORK, *County of New York, ss:*

Robert I. Jenks, one of the Executors of the last Will and Testament of Joseph Stickney, deceased, being duly sworn, says as follows:—

Said Joseph Stickney died December 21st, 1903.

His residence at the time of his death was at No. 874 Fifth Avenue, in the Borough of Manhattan, County of New York.

14 His last Will and Testament was duly proved before one of the Surrogates of the County of New York on the 28th day of December, 1903. A true copy of said Last Will and Testament is hereto annexed.

On the 29th day of December, 1903, letters testamentary thereon were issued to Carolyn Foster Stickney, Executrix, to this deponent and to John G. Hannah, Executors, named in said Will, by the Surrogate's Court of the County of New York.

The names and addresses of the Executors are as follows:—

Carolyn Foster Stickney, No. 874 Fifth Avenue, Borough of Manhattan, County of New York.

Robert I. Jenks and John G. Hannah, No. 1 Broadway, Borough of Manhattan, County of New York.

The personal property of said decedent, itemized, is set forth, par and market value of each item at date of decedent's death, in the printed inventory and appraisement annexed hereto, and the value thereof was ascertained by said Executors with the aid and in the presence of Hamilton Young and William J. Gilroy who were duly appointed by one of the Surrogates of the County of New York for that purpose and who were sworn as appraisers.

No reversion fell in by reason of decedent's death.

Decedent made no transfer or conveyance of real or personal property prior to death in contemplation of death or to take effect at or after death. Nor did he have any interest in any other estate.

Decedent was given no power of disposition of property by the Will of another.

Deponent has made diligent search for property of every kind, nature and description left by the decedent and he has been able to discover only that mentioned or referred to in this affidavit and he verily believes the decedent left no property except that set forth and referred to in this affidavit and except as follows:—

15

	Par Value.
Note of Frank B. Armington, Dated July 1, 1899, Payable on demand. Interest at 4½ %. Interest paid to Jan. 1, 1903..	$15,000.
Note of James H. Goodrich, Dated Nov. 29, 1902. Due May 29, 1904. Interest at 4 %. No interest paid.....	100.
Note of Mary F. Colley, Dated Oct. 28, 1903. Due Oct. 28, 1904. Interest at 6 %. No interest paid.....	100.
Steam Yacht Susquehanna and contents.....	20,000.
Contents of Stable at Mount Pleasant, New Hampshire.....	500.
Furniture, etc., at Jekyl Island.....	1,000.
	36,700

Under the Second Section of the Will of said decedent, Carolyn Foster Stickney, the widow of said decedent has a life estate in certain real property referred to in said second section.

She also has a life estate in the following personal property referred to in said section, namely:—

Furniture, beds and bedding, paintings, silverware, bric-a-brac, and all other household goods and stores which have been appraised at.....	$10,000.
Also carriages, horses, harness and equipages which have been appraised at.....	1,000.

Under said second section said Carolyn Foster Stickney has further the absolute power of disposition of the remainder of said real and personal property by deed or will executed after the death of said decedent.

Under the Thirteenth Section of the Will of said decedent, Carolyn Foster Stickney, the widow of said decedent, has a life estate in the residuary real and personal property with absolute power of disposition of the remainder of said residuary real and personal
16 property by deed or will executed after the death of said decedent.

Said Carolyn Foster Stickney elects to have the transfer tax, which may be imposed according to law, computed upon the entire fee and capital of all the property real and personal given or devised to her, as if her estate therein were a fee simple absolute, and not a life estate with the absolute powers of disposition, for the reason that she intends to execute the absolute powers of disposition given to her by said Will.

Herbert S. Osgood and Mary Jane Moran, two legatees under the Sixth Section of said Will, died before the decedent.

Under the Seventh Section of said Will, the legacy given to Herbert S. Osgood is to go to his children who were living at the death

of the decedent, namely:—Robert C. Osgood, Mark J. Osgood, Herbert S. Osgood, Lillian A. Osgood, and Charles F. Osgood; and the legacy given to Mary Jane Moran is to go to John G. Moran, her child, who was living at the death of the decedent.

The decedent left real property in the State of New York.

In this matter deponent is advised by counsel and believes that the decedent's real property in New York State devised to his widow is not taxable under the Transfer Tax Laws of the State of New York; that under said laws prior to Chapter 41 of the Laws of 1903, hereinafter referred to, said decedent's real property so devised to his widow would not have been taxable; that a tax on such real property of said decedent so devised is attempted to be imposed, continued or revived or a debt or charge thereon to be created by virtue of the Act of the Legislature known as Chapter 41 of the Laws of 1903, entitled: "An act to amend the tax law relating to exceptions and "limitations in the taxation of taxable transfers." Said Act purports to impose, continue or revive a tax, or create a debt or charge, and is unconstitutional, invalid and void for the reason that said
17 Act was "passed, a majority being present," and that a quorum of three-fifths of all the members elected to either House was not present on the final passage of said Act, as will conclusively appear by the certificates of the presiding officers of the two Houses of the Legislature appended to said original Act, or by a duly certified copy of said Act and of said certificates of the presiding officers of said two Houses.

Objecting and protesting that decedent's real property situated in the State of New York is not taxable for the reasons aforesaid, this deponent sets forth such real property in the following list, together with the value at which the same is assessed by the Commissioners of Taxes and Assessments for the year 1903:—

In the Borough of Manhattan, City and County of New York.

Property.	Section.	Block.	Lot.	Value.
No. 112 West 56th St.....	4	1727	41	$23,000
No. 874 Fifth Avenue.....	5	1383	4	400,000

In the Borough of the Bronx, City and County of New York.

One undivided half part of the following:

Property.	Section.	Block.	Lot.	Value.
South side of East 169th Street. Vacant.....	9	2466	15	$1,200.
	...	.....	24	900.
	...	.....	25	900.

Property.	Ward.	Volume.	Lot No.		Value.
Latonia Park.....	24	10	36		$200.
	...	...	37		200.
	...	...	38		200.
	...	...	39		200.
	...	...	40		200.
	...	...	41		200.
	...	...	42		200.
	...	...	15		200.
	...	...	16		200.
18	...	...	1		300.
	...	...	2		300.
	...	...	11		200.
	...	...	12		200.
	...	...	13		200.
	...	...	14		1,500.
	...	...	34		200.
	...	...	35		200.
	...	...	316		450.
	...	...	317		300.
	...	...	318		325.
	...	...	319		350.
	...	...	320		500.
	...	...	321		500.
	...	...	322		325.
	...	...	323		300.
	...	...	324		275.
	...	...	325		250.
	...	...	326		300.
	...	...	342		400.
				Plot.	
	...	...	1	2	145,000.
	...	12	2	4	100,000.
	...	10	343		275.
	...	...	344		275.
	...	...	345		275.
	...	...	346		275.
	...	...	347		275.
	...	...	348		275.
	...	...	349		275.
	...	...	350		275.
	...	...	351		275.
	...	...	352		400.
	...	...	353		400.
	...	...	354		400.
	...	...	355		350.
	...	...	356		300.
	...	...	357		275.
	...	...	358		250.
	...	...	359		300.

19 Property.	Ward.	Volume.	Lot No.	Value.
Wakefield	...	...	G 77	$1,500.
	...	...	G 73	300.
	...	...	G 80–1	250.
	...	...	G 80–3	100.
	...	...	155	1,200.
	...	...	157	1,200.
	...	...	160	1,200.
	...	...	161	1,200.
	...	...	164	1,200.
	...	...	165–3	600.
	...	...	169	1,200.
Wakefield	24	10	176	$1,600.
	...	...	G 81	700.
	...	...	G 82	800.
	...	...	G 83	800.
	...	...	G 84	500.
	...	...	G 85	2,100.
	...	...	G 86	400.

the title to the whole of the foregoing standing at the time of his death in the name of Joseph Stickney, but one-half of it being so held in trust and for the benefit of another.

The following are the deductions claimed and in detail:

Debts due and owing at the date of decedent's death and since paid by the Executors.....	$10,440.96
Taxes assessed against decedent's property and unpaid at the time of his death.....	None.
Funeral expenses of decedent.....	2,521.86
Expenses of administration.....	21,243.90
Legal commissions of the Executors.....	$
Total Deductions.....	$

The names of the beneficiaries, their relationship to decedent, and the amount of each legacy or distributive share are as follows:—

20 Name.	Relationship.	Amount of legacy or distributive share.
Carolyn Foster Stickney.....	Widow.	
Under the Second Section as hereinbefore particularly set forth a life estate in Furniture, etc., appraised at.....	.....	$10,000
In Carriages, etc., appraised at.....	.....	1,000
With absolute power of disposition of the remainder of said personal property by deed or will.		
Mary T. Stickney.....	None	5,000
Ella T. Stickney.....	Niece.....	100,000

Name.	Relationship.	Amount of legacy or distributive share.
Harriet S. Jenks	Cousin	10,000
Rebecca L. Armington	"	10,000
Olivia G. Moulton	"	10,000
Charles S. Boardman	"	10,000
Lucretia S. Waterman	"	10,000
Charles F. Osgood	"	5,000
Robert C. Osgood Mark J. Osgood Herbert S. Osgood Lillian A. Osgood Charles F. Osgood Children of Herbert S. Osgood, deceased, residing with their mother Lillian J. Osgood.	"	5,000
John G. Moran Son of Mary Jane Moran, deceased.	"	10,000
Albert C. Gibson	"	10,000
B. Walker Peterson	"	10,000
Mary F. Gibson	"	10,000
21 Ruth A. Gibson	Cousin	2,500
Adelaide M. Gibson	"	2,500
Mary T. Gibson	"	2,500
Cora I. Gibson	"	2,500
George B. Osgood	"	10,000
Lucretia O. Bailey	"	10,000
Mary L. J. Paige	"	10,000
Allen M. Jenks	"	10,000
Robert I. Jenks	"	100,000
The Home for Friendless Children of Wilkesbarre, Pennsylvania	.....	5,000
The Wilkesbarre City Hospital	.....	5,000
The Centennial Home for the Aged of Concord, New Hampshire	.....	5,000
The Margaret Pillsbury General Hospital of Concord, New Hampshire	.....	5,000
The Charity Organization Society of the City of New York	.....	5,000
Carolyn Foster Stickney Under the Thirteenth Section, as hereinbefore particularly set forth, a life estate in the residuary real and personal property with absolute power of disposal of the remainder of said real and personal property by deed or will	Widow.	$—

All parties in interest are of full age and sound mind except the following:—

Robert C. Osgood, who is an infant over the age of fourteen
22 years, and Mark J. Osgood, Herbert S. Osgood, Lillian A. Osgood and Charles F. Osgood, who are infants under the age of fourteen years, all of whom reside with their mother at Claremont, New Hampshire, and who have no guardian appointed in this State.

ROBERT I. JENKS.

Sworn to before me this 9th day of May 1904.

WILLIAM MOLLOY,

[SEAL.] *Notary Public, No.* 129, *Kings Co., N. Y.*

Certificate filed in N. Y. Co.

(Copy.)

To Mr. Robert I. Jenks, Mr. John G. Hannah, Executors of the Last Will and Testament of Joseph Stickney, deceased, and James Yereance, Appraiser, or any other Appraiser appointed in the Matter of the Transfer Tax upon the Estate of Joseph Stickney, deceased.

SIRS: I intend to execute the absolute powers of disposition given to me by the Last Will and Testament of Joseph Stickney, deceased, and I therefore request you to have the transfer tax which may be imposed according to law computed upon the entire fee and capital of all the property real and personal given or devised to me, as if my estate therein were a fee simple absolute.

Dated, New York, April 27, 1904.

CAROLYN F. STICKNEY.

23 *Last Will and Testament of Joseph Stickney.*

In the Name of God, Amen.

Page 1

I, Joseph Stickney, now residing at Number 874 Fifth Avenue, in the Borough of Manhattan, in the City, County and State of New York, merchant, do hereby make, publish and declare this to be my last will and testament.

I.—If, at the time of my decease, I should be a member of any partnership or partnerships my executrix and executors are hereby authorized to permit my share of the assets of such partnership or partnerships to remain in the firm business and to continue said business, in co-operation with my surviving partner or partners, for such time as may be necessary to conveniently wind up the then pending affairs of any such partnership or partnerships, instead of immediately collecting my share of such assets by a forced liquidation; but this authority is limited to so much of my estate
Page 2 as may then be* invested by me as my share in any particular partnership or partnerships; my will being that no por-

tion whatever of my estate shall be made liable by my executrix or executors for any debts which shall be created or contracts which shall be made after my death, by such partnership or partnerships or by any successor thereof, beyond my share of the assets of any particular partnership to be ascertained at the date of my death. If any losses shall occur in so conducting said business during such continuance, my executrix and executors shall not be individually chargeable with such losses; and they shall retain for their compensation for co-operating in such conduct of such business one-half of the net profits accruing therefrom, after deducting interest on the capital at the rate of five *per centum per annum*, and the other half of said profits shall go to and form part of my estate.

24 Page 3

II.—I give, devise and bequeath to* my beloved wife, Carolyn Foster Stickney, during her natural life, my house and lot now known as Number 874 Fifth Avenue in the said Borough of Manhattan, where I now reside, together with all the furniture, beds and beddings, paintings, silverware, bric-a-brac and all other household goods and stores, which I may have therein at the time of my decease, and also my lot and stable now known as Number 112 West Fifty-sixth Street in the said Borough of Manhattan, with the carriages, horses, harness, and equipages, which I may have therein at the time of my decease.

I further give to my said wife, during her life-time, the absolute power of disposition and alienation of the entire fee of the lands, buildings and chattels above specified in this section, for her own benefit, or otherwise, as she may desire, by conveyance, charge, deed, mortgage, lease, transfer, assignment or otherwise, to any

Page 4 grantee, alienee, or transferee whatever, which power* can be executed by her only by a written instrument or instruments, to be made by her after my death, and which may be so executed either by one such instrument disposing of all the lands, buildings and chattels above specified in this section, or at her pleasure by several such instruments each disposing of part of the same, and to be made by her from time to time as she may see fit.

I further give to my said wife power to dispose of the lands, buildings and chattels above specified in this section, or of any part of the same remaining undisposed of at her death under the preceding power, to and among such persons and in such manner as she may in her discretion direct, limit and appoint by any last will and testament, which may be made by her after my death.

The foregoing powers are subject to the future estates limited thereon in the next succeeding section of my will, in case

Page 5 the said powers shall not be executed as aforesaid* by my wife after my death.

25 III.—In case my said wife should die before me, or in case she should survive me and die without executing as aforesaid either of the powers hereinbefore given to her, then as to the lands, buildings and chattels above specified in section two, or any part thereof, so undisposed of by her at her death, I give, devise and bequeath the same as follows, namely:

One equal undivided half part thereof to my niece Ella T. Stickney and the other equal undivided half part thereof to Robert I. Jenks.

IV.—I give and bequeath to Mary T. Stickney, the widow of my deceased brother, Frank E. Stickney, the sum of Five Thousand Dollars ($5,000).

V.—I give and bequeath to my niece Ella T. Stickney the sum of One Hundred Thousand Dollars ($100,000).

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*VI.—I give and bequeath to the following-named persons the several legacies below specified, to wit:

To Harriet S. Jenks Ten Thousand Dollars ($10,000).

To Rebecca L. Armington Ten Thousand Dollars ($10,000).

To Olivia G. Moulton Ten Thousand Dollars ($10,000).

To Charles S. Boardman Ten Thousand Dollars ($10,000).

To Lucretia S. Waterman Ten Thousand Dollars ($10,000).

To Charles F. Osgood Five Thousand Dollars ($5,000).

To Herbert S. Osgood Five Thousand Dollars ($5,000).

To Mary Jane Moran Ten Thousand Dollars ($10,000).

To Albert C. Gibson Ten Thousand Dollars ($10,000).

26 To B. Walker Peterson Ten Thousand Dollars ($10,000).

To Mary F. Gibson Ten Thousand Dollars ($10,000).

To Ruth A. Gibson Two Thousand Five Hundred Dollars ($2,500).

To Adelaide M. Gibson Two Thousand Five Hundred Dollars ($2,500).

Page 7 *To Mary T. Gibson Two Thousand Five Hundred Dollars ($2,500).

To Cora I. Gibson Two Thousand Five Hundred Dollars ($2,500).

To George B. Osgood Ten Thousand Dollars ($10,000).

To Lucretia O. Bailey Ten Thousand Dollars ($10,000).

To Mary L. J. Paige Ten Thousand Dollars ($10,000).

To Allen M. Jenks Ten Thousand Dollars ($10,000).

To Robert I. Jenks One Hundred Thousand Dollars ($100,000).

VII.—I order and direct that if any legatee named in the foregoing sixth section shall have died before me the legacy above given to such deceased legatee shall go to and be divided among his or her child or children who may be living at my death, and the issue then living of any deceased child or children of such deceased legatee, such issue taking always *per stirpes* and not *per capita;* but if there be no child or children of such deceased legatee, nor the

Page 8 issue of any of his or her deceased child or *children, living at the time of my decease, then such legacy shall lapse and shall form part of my residuary estate.

VIII.—I give and bequeath to the Home for Friendless Children of Wilkes-Barre, Pennsylvania, and to the Wilkes-Barre City Hospital of the same City, each, the sum of Five Thousand Dollars ($5,000).

IX.—I give and bequeath to the Centennial Home for the Aged of Concord, New Hampshire, the sum of Five Thousand Dollars ($5,000).

27 X.—I g[illegible] and bequeath to the Margaret Pillsbury General Hospital, of Concord, New Hampshire, the sum of Five Thousand Dollars ($5,000).

XI.—I give and bequeath to the Charity Organization Society of the City of New York, the sum of Five Thousand Dollars ($5,000).

XII.—I further direct as my Will that all taxes, imposed
Page 9 by law on* any legacies, or distributive shares, or transfers of property, shall be paid out of and charged against my residuary estate; so that all the preceding legacies and bequests shall be paid without deduction therefrom by reason of any such tax, by whatsoever name it may be designated.

XIII.—All the rest, residue and remainder of my estate, real, personal and mixed, of which I may die seized, or possessed, or to which I may be in any manner entitled, I give, devise and bequeath to my said wife, Carolyn Foster Stickney, during her natural life, subject to the power hereinafter given to my executrix and executors to sell my residuary real estate.

I further give to my said wife, during her lifetime, the absolute power of disposition and alienation of the entire fee and capital of all said residuary estate for her own benefit, or otherwise as she may desire, by conveyance, charge, deed, mortgage, lease, transfer, assignment, or otherwise, to any grantee, alienee, or transferee
Page 10 whatever, which power can be executed by* her only by a written instrument or instruments, to be made by her after my death, and which may be so executed either by one such instrument disposing of all said residuary estate, or at her pleasure by several such instruments each disposing of part of the same, and to be made by her from time to time as she may see fit.

I further give to my said wife power to dispose of the entire fee and capital of all said residuary estate, or of any part of the
28 same remaining undisposed of at her death under the preceding power, to and among such persons and in such manner as she may, in her discretion, direct, limit and appoint by any last will and testament, which may be made by her after my death.

The foregoing powers are subject to the future estates limited thereon in the next succeeding section of my will, in case the said powers shall not be executed as aforesaid by my wife after my death.

XIV.—In case, however, my said wife should die before
Page 11 me, or in case she* should survive me and die without having executed as aforesaid either of the powers given to her under the preceding section of this will, then, as to my said residuary estate so undisposed of by her at her death, I give, bequeath and devise the same as follows, namely:

One equal undivided half part thereof to my niece Ella T. Stickney and the other equal undivided half part thereof to Robert I. Jenks.

XV.—I make, nominate and appoint Carolyn Foster Stickney, Robert I. Jenks and John G. Hanna, all of the City of New York, executrix and executors of this my last will and testament.

In addition to the powers already hereby given to them as such executrix and executors, I do hereby authorize and empower them

or such of them as may qualify and the survivor of them to grant, bargain, sell and convey, by good, lawful and sufficient deed or deeds, all the residuary real estate of which I may die
Page 12 seized or possessed, or in any manner* entitled to, wheresoever the same may be situated, at such times, to such persons and on such terms, as to them may seem meet. I specially request that no bail or surety, in any form whatever, shall be required of my said executrix or executors, by reason of her or his non-residence in the State or States wherein this will shall be admitted to probate.

29 XVI. I hereby revoke all former wills by me at any time made.

In witness whereof, I have hereunto subscribed my name and affixed my seal this fifteenth day of May in the year of our Lord One thousand nine hundred.

(S'd) JOSEPH STICKNEY. [SEAL.]

Signed, seal-, published and declared by the said Joseph Stickney, the testator above named, to be his last will and testament, and by him subscribed at the end thereof in the presence of us,
Page 13 who, at his request, in his* presence, and in the presence of each other, have hereto subscribed our names as witnesses and our residences the day and year lastly above written.

WM. MITCHELL,
Palmer Avenue, Yonkers, N. Y.
FRED'K C. McLAUGHLIN,
256 Sterling Place, Borough of Brooklyn, New York City.
LEON MALRAISON,
144 *West Fourth Street, Manhattan, N. Y. City.*

Inventory and Appraisement of Personal Property of Joseph Stickney, Deceased.

To all persons interested in the estate of Joseph Stickney deceased, as legatees, next of kin, or otherwise:

Notice is hereby given, that the Executrix and Executors of the Estate of said deceased, with the aid of appraisers, for the purpose duly appointed by the Surrogate of the County of New York, will on the 3rd day of March 1904, at 12 o'clock noon of that day, at No. 1 Broadway, Borough of Manhattan, in the City of New York,
30 in said County, proceed to make an Inventory and Appraisement of all the goods, chattels and credits of said deceased.

Dated this 25th day of February, 1904.

HAMILTON YOUNG,
WILLIAM J. GILROY,
Appraisers.
CAROLYN FOSTER STICKNEY,
ROBERT I. JENKS,
JOHN G. HANNAH,
Executors.
MITCHELL & MITCHELL,
Attorneys for Executors, No. 44 and 46 Wall Street, Manhattan, New York City, N. Y.

STATE OF NEW YORK, *County of New York, ss:*

Frank McGoldrick, of the Borough of Brooklyn, City of New York, being duly sworn, says that he made service of the foregoing original notice of appraisement on the following named persons by delivering to each of them a true — thereof as follows, that is to say on:—

Alfred Osgood.....At No. 1 Broadway, Borough of Manhattan, City of New York.
Allen M. Jenks.....At No. 1 Broadway, Borough of Manhattan, City of New York.
Robert I. Jenks.....At No. 1 Broadway, Borough of Manhattan, City of New York.
George B. Osgood.....At 477 Broome St., Borough of Manhattan, City of New York.
Lucretia O. Bailey.....At No. 66 East 77th St., Borough of Manhattan, City of New York.

By leaving such copy with Margaret Kiernan, a person of suitable age and discretion.
Charity Organization Society of New York.....At No. 105 East 22nd St., Borough of Manhattan, City of New York.

31 By delivering a copy thereof to George F. Devine, General Secretary.

on the 26th day of February, 1904; and that he made service of the foregoing original notice of appraisement on the following-named persons by delivering to each of them a true copy thereof as follows, that is to say on:

Mary F. Gibson.....At No. 144 East 37th St., Borough of Manhattan, City of New York.
Cora I. Gibson.....At No. 144 East 37th St., Borough of Manhattan, City of New York.
Adelaide M. Gibson.....At No. 144 East 37th St., Borough of Manhattan, City of New York.
Ruth A. Gibson.....At No. 144 East 37th St., Borough of Manhattan, City of New York.

on the 27th day of February, 1904, and that on said 27th day of February, 1904, he posted three copies thereof in three public places in said County as required by statute, to wit:—One copy in the County Court House; one copy in the City Hall; and one copy in the Register's Office.

FRANK McGOLDRICK.

Sworn to before me this 2nd day of March, 1904.

LEON MALRAISON,
Notary Public, New York Co., N. Y.

STATE OF NEW YORK, *County of New York, ss:*

I, Hamilton Young, an appraiser, duly appointed by the Surrogate of said County, do swear and declare, that I will truly, honestly, and impartially appraise the personal property of Joseph Stickney, late of the County aforesaid, deceased, which shall be for that pur-
32 pose exhibited to me, to the best of my knowledge and ability.

HAMILTON YOUNG.

Sworn this 3d day of March, 1904, before me,

LEON MALRAISON,
Notary Public, New York County, N. Y.

STATE OF NEW YORK, *County of New York, ss:*

I, William J. Gilroy an appraiser duly appointed by the Surrogate of said County, do swear and declare, that I will truly, honestly, and impartially appraise the personal property of Joseph Stickney, late of the County aforesaid, deceased, which shall be for that purpose exhibited to me, to the best of my knowledge and ability.

WM. J. GILROY.

Sworn, this 3rd day of March, 1904, before me.

LEON MALRAISON,
Notary Public, New York County, N. Y.

STATE OF NEW YORK, *County of New York, ss:*

Carolyn Foster Stickney, Robert I. Jenks and John G. Hannah, Executors of the estate of Joseph Stickney, deceased, being severally duly sworn, each for herself and himself says, that the annexed Inventory is in all respects just and true; that it contains a true statement of all the personal property of the said deceased, which has come to the knowledge of the deponent, and particularly of all money, bank bills and other circulating medium, belonging to the said deceased, and of all just claims of the said deceased
33 against the deponent, to the best of the knowledge of the deponent.

CAROLYN F. STICKNEY.
ROBERT I. JENKS.
JOHN G. HANNAH.

Sworn, this 2nd day of March 1904, before me

LEON MALRAISON,
Notary Public, New York County, N. Y.

A true and perfect inventory of all the Goods, Chattels, and credits, which were of Joseph Stickney, late of the County of New York, deceased, made by the Executrix and Executors of the Estate of said deceased, with the aid and in presence of Hamilton Young and William J. Gilroy they having been duly appointed and sworn as appraisers; containing a full, just and true statement of all the per-

sonal property of the said deceased, which has come to the knowledge of the said Executrix and Executors of said Estate, and particularly of all moneys, bank bills and all other circulating medium belonging to the said deceased, and of all just claims of the said deceased, against said Executrix and Executors and of all bonds, mortgages, notes, and other securities for the payment of money belonging to the said deceased, specifying the names of the debtor in each security, the date, the sum originally payable, the endorsement thereon, and the sum which, in the judgment of the Appraisers, may be collectible on such security.

Upon the completion of this Inventory, duplicates thereof have been made and signed at the end thereof, by the Appraisers.

34 *Inventory and Appraisement of the Personal Estate of Joseph Stickney, Deceased.*

Died December 21, 1903.

Bonds.	Par value.	Appraised value.
Lytle Coal Co. Thirty (30) Coupon bonds; $1000 each; dated July 1, 1897. Nos. 197, 198, 199, 200, 201, 202, 203, 204, 205, 206 due 1910; Nos. 256, 257, 258, 259, 260, 261, 262, 263, 264, 265 due 1912; Nos. 376, 377, 378, 379, 380, 381, 382, 383, 384, 385 due 1916. Interest at 5 per cent. payable January and July.		
Interest collected to July 1, 1903.....	$30,000	
Appraised value 50%.....		$15,000
Susquehanna Coal Co. Twenty-four (24) Coupon bonds; $1000 each; dated January 1, 1871; due January 1, 1911; Nos. 136, 139, 193, 194, 241, 253, 350, 351, 352, 353, 354, 364, 366, 369, 370, 371, 372, 373, 374, 381, 382, 383, 384, 385. Interest at 6 per cent. payable January and July.		
Interest collected to July 1, 1903.....	24,000	
Appraised value of 107%.....		25,680
Over.....	$54,000	$40,680
35 Forward.....	$54,000	$40,680
Missouri Pacific Railway Co. Extended 5s. Five (5) Coupon bonds; $1000 each; dated May 4, 1891; due July 1, 1938; Nos. 2334, 2335, 2337, 2386, 2486. Interest at 5 per cent.; payable January and July.		
Interest collected to July 1, 1903.....	5,000	
Appraised value 111%.....		5,550
Long Island City & Flushing Railroad Company. Five (5) Coupon bonds; $1000 each; dated May 1, 1881; due May 1, 1911; Nos. 290, 293, 294, 296, 575. Interest at 6 per cent.; payable May 1 and Nov. 1.		
Interest collected to November 1, 1903.....	5,000	
Appraised value 110%.....		5,500

Bonds.	Par value.	Appraised value.
Oregon Short Line Railroad Company. Four (4) coupon bonds; $1000 each; dated Nov. 1, 1881; due February 1, 1922; Nos 4884, 4885, 7385, 7841. Interest at 6 per cent. payable Feb'y and August.		
Interest collected to August 1, 1903.....	$4,000	
Appraised value 123 %.....	.....	$4,920
Fort Worth & Denver City Railroad Co. Fourteen (14) coupon bonds; $1000 each; dated December 29, 1881; due December 1921; Nos. 524, 597, 866, 1557, 2542, 2694, 3330, 4836, 5523, 5568, 5791, 6488, 6785, 6786. Interest at 6 per cent.; payable June and December.		
Interest collected to December 1, 1903.....	14,000	
Appraised value 103 %.....	.....	14,420
Over.....	$82,000	$71,070
,36 Forward.....	$82,000	$71,070
Northern Pacific Railway Co. Prior lien 4s. Five (5) coupon bonds; $1000 each; dated November 10, 1896; due January 1, 1997; Nos. M32659, 32660, 32661, 32662, 32663. Interest at 4 per cent.; payable Jan'y Ap'l July and October.		
Interest collected to October 1, 1903.....	5,000	
Appraised value 103 %.....	.....	5,150
Chesapeake & Ohio Railway Co. Ten (10) coupon bonds $1000 each; dated February 23, 1892; due March 1992. Nos. 26371, 26372, 26373, 26374, 26375, 26376, 26377, 26378, 26379, 36380. Interest at 4½ per cent. payable March and September.		
Interest collected to September 1, 1903.....	10,000	
Appraised value 102⅛ %.....	.....	10,212 50
American Yacht Club. One (1) coupon bond; $500; dated July 2, 1888; due July 1 1908 No. 52. Interest at 4 per cent. payable July 1.		
Interest collected to July 1, 1903...	500	
Appraised value 80 %.....	.....	400
Jekyl Island Club. Five (5) coupon bonds; $1000 each; dated July 1, 1900; due July 1, 1930; Nos. 99, 100, 101, 102, 103. Interest at 4½ per cent. payable Jan. 1 and July 1.		
Interest collected to July 1, 1903.....	5,000	
Appraised value 50 %.....	.....	2,500
Over.....	$102,500	$89,332 50

37 Stocks.	Par value.	Appraised value.
Forward	$102,500	$89,332 50
STOCKS.		
Mt. Pleasant Hotel Co. Six thousand five hundred (6500) shares Common Stock, $100 each;		
Cert. Nos. *Dated.* *Shs.* 35 to 99 both inclusive. May 20, 1902 100 each.		
Dividends 1 % collected to February 1903	650,000	
Appraised value 25 %		162,500
Mt. Pleasant Hotel Co. Two thousand five hundred and ninety-seven (2597) shares Preferred Stock $100 each.		
Certs. No. *Dated.* *Shs.* A1 to A15 July 1, 1903 100 Both Inclusive shares each. A39 to A48 " " " " Both inclusive B 5 " " " 97 shares		
No Dividends collected	259,700	
Appraised value 30 %		77,910
Grand Rapids & Indiana Railway Co. Thirty (30) shares capital stock $100 each.		
Cert. No. *Dated.* *Shs.* 22 Sept. 15, 1896 30		
Dividends 1½ % collected to October 1903	3,000	
Appraised value 33⅓ %		1,000
Sans Souci Association. One (1) share capital stock $5000. Certificate No. 3 dated November 1, 1899.		
No dividends collected	5,000	
Appraised value 50 %		2,500
Over	$1,020,200	$333,242 50

38 Stocks and money loaned.	Par value.	Appraised value.
Forward	$1,020,200	$333,242 50
Jekyl Island Club. One (1) share capital stock $600. Certificate No. 137 dated May 18, 1888.		
No Dividends collected	600	
Appraised value 100 %		600
One-third interest in Syndicate holding 9 shares capital stock Jekyl Island Club	1,800	1,800
One-third interest in one share of capital stock of Jekyl Island Club	200	200
Westchester County Horse Show Assn. Five (5) shares capital stock $10 each; Temporary Certificate No. 94, dated May 7, 1896.		
No Dividends collected	50	
Appraised Value 2 %		1 00

Stocks and money loaned.	Par value.	Appraised value.
Concord Shoe Factory Twenty-five (25) shares capital stock $100 each.		
Certificate No. 13 dated Aug. 11, 1884, for 10 shares;		
Certificate No. 85 dated Oct. 9, 1884, for 15 shares.		
No Dividends collected	$2,500	
Appraised Value 25 %		$625
Pennsylvania Canal Co. Three (3) shares capital stock $50 each. Certificate No. 137 dated Feb'y 15, 1869.		
No Dividends collected	150	
Appraised Value		No value.
MONEY LOANED.		
Note of John T. Dutcher to Joseph Stickney, dated Oct. 10, 1900, due April 10, 1901.		
Interest 6 per cent.		
Interest collected to October 1, 1903	200 00	
Appraised Value		200
Over	$1,025,700	$336,668 50

39 Accounts receivable and cash, furniture, &c.	Par value.	Appraised value.
Forward	$1,025,700	$336,668 50
ACCOUNTS RECEIVABLE.		
Stickney & Conyngham, capital invested in business	1,000,000 00	1,000,000 00
Hildreth & Co., capital invested in business. (The par value of the foregoing being taken from the personal books of account of decedent by the Executors.)	70,500 00	50,000
Stickney & Conyngham, balance of personal account	110,545 42	110,545 42
Hildreth & Co.	3,632 50	3,632 50
James H. Goodrich.	5 00	5 00
F. J. Deemer	89	89

Accounts receivable and cash, furniture, &c	Par value.	Appraised value.
CASH.		
On deposit with the National Bank of Commerce.....	$51,871 03	$51,896 53
On Deposit with Grant & Co	333 14	333 14
" " " "	32	32
Cash on hand.....	300 00	300 00
" " Foreign..... £100 sterling	493 55	493 55
" " " ..... 50 Francs		
The following three items have been valued by the executors at the amounts shown opposite thereto:		
Furniture, beds and bedding, paintings, silverware, bric a brac and all other household goods and stores in testator's dwelling house, No. 874 Fifth Avenue, Manhattan, New York City, bequeathed to widow.....	10,000 00	10,000 00
	$2,273,381 85	$1,563,875 85

40 Furniture, &c.	Par value.	Appraised value.
Forward.....	$2,273,381 85	$1,563,875 85
Carriages, Horses, Harness, and Equipages, contained in Stable No. 112 West 56th St., Manhattan, New York City, bequeathed to widow..	1,000.00	1,000 00
Furniture, beds and bedding, paintings, silverware, bric a brac and all other household goods and stores in testator's dwelling house, "Ballyhoo" at Williamsbridge, Bronx, New York City; also contents of stable at same place.....	5,000 00	5,000 00
Policy of Life Insurance of New England Mutual Life Insurance Co. of Boston, Mass., dated Nov. 15, 1863, No. 14522, Insuring life of testator	2,000 00	2,000 00
Whole amount of inventory.....	$2,281,381 85	$1,571,875 85

Dated New York, March 26, 1904.

HAMILTON YOUNG,
WM. J. GILROY,
Appraisers.

41 *Affidavit of Robert I. Jenks and Schedules Verified July 6, 1904.*

Surrogate's Court, County of New York.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

STATE OF NEW YORK, *County of New York, ss:*

Robert I. Jenks, one of the Executors of the Last Will and Testament of Joseph Stickney, deceased, being duly sworn, says as follows:

Since the affidavit made by this deponent in the above-entitled proceeding, this deponent has received from William L. Conyngham, the surviving partner of the firm of Stickney and Conyngham, a certificate showing that the assets of the firm of Stickney and Conyngham on the twenty-first day of December, 1903, were in excess of the amount of One Million Dollars, which was charged against said firm on the personal books of account of said Joseph Stickney, deceased, as capital invested in the business of said firm and set forth at the above amount in the inventory and appraisement of the estate, dated March 26th, 1904, and which is attached to this deponent's affidavit above referred to.

On information and belief, the interest of Joseph Stickney in said late firm of Stickney & Conyngham was one equal half share of the assets and of the profits thereof, and he was liable for one-half of the losses, expenses, debts and obligations of said late firm.

42 The Schedule hereto annexed contains a true and detailed statement to the best of this deponent's knowledge and belief of the assets and liabilities of said late firm as they appear on the books of said firm as of the date of December 21, 1903, and shows the cost appearing on the books of said firm of each of the assets and also the market value thereof on the twenty-first day of December, 1903, the interest on the bonds to December 21, 1903, being included in such market value.

It also shows the liabilities appearing on said books and the amounts thereof.

The value of decedent's one-half interest in said firm of Stickney and Conyngham is $2,572,887.02 and after making the deductions hereinafter set forth amounting to 262,750.93 leaves the net value for purposes of taxation $2,310,136.09.

Since the affidavit made by this deponent in the above-entitled proceeding, this deponent has received from Henry H. Pease, who is the liquidator of said firm, a certificate, a copy of which is hereto annexed, being the Trial Balance as of December 19, 1903, of the late firm of Hildreth and Company, showing that the assets of said late firm on the twenty-first day of December, 1903, were less than the amount of Seventy-five thousand dollars charged against said firm on the personal books of account of said Joseph Stickney, deceased, as capital invested in the business of Hildreth and Company,

and less also than the appraised value of Fifty thousand Dollars set forth in the inventory and appraisement of the estate, dated March 26, 1904, and appended to this deponent's previous affidavit hereinbefore referred to.

Prior to the death of Joseph Stickney, he had sold and transferred a certain portion of his capital which had been invested in the firm of Hildreth and Company, to the Nanticoke Store Company, and it was after his death that shares of the capital stock of the Nanticoke Store Company so purchased came into the possession of his Executors.

The Schedule hereto annexed shows the value of the un-
43 liquidated assets of Hildreth and Company, exclusive of real estate, and of the shares of capital stock of the Nanticoke Store Company so received by the Executors and above referred to, less one hundred shares agreed by the testator to be transferred for services rendered, and which have been so transferred by said Executors; such value amounting to the sum of Twenty-five thousand Dollars.

(S'd) ROBERT I. JE[illegible]S, *Ex.*

Sworn to before me this 6th day of July, 1904.

LEON MALRAISON,
Notary Public, New York County, N. Y.

DEBIT.			CREDIT.		
Cash		$437,284.26	Capital Account		$4,500,000.00
Capital in Coal Firms		765,237.15	Profit & Loss Acct	$328,291.60	
Real Estate: New York			Less Exp	66,513.16	
Ballyhoo	$205,088.07				261,778.44
Violet Park	50,000.00		Accts. Payable		97,134.70
West 169th St	3,329.83		Due J. Stickney		102,599.12
		258,417.90	" W. L. Conyngham		66,722.37
Real Estate: Penna.					
Coal Lands, Penna.					
J. Stickney, Trustee		133,950.52			
Mortgages—Sheet		316,337.50			
Stocks "		1,238,009.53			
Bonds "		1,234,922.38			
Accts. Receivable		290,975.39			
Sundry Notes at par	$107,100.				
Notes Lytle C. Co. at par	246,000.				
		353,100.00			
		5,028,234.63			$5,028,234.63

45	Assets as above	5,028,234.63
	Less Liabilities as above	266,456.19
	Excess of Assets over Liabilities	$4,761,778.44

WILKESBARRE, PENNA., *June 4th*, 1904.

This is to certify that I have examined the above Trial Balance from the books of Stickney & Conyngham, and certify that the same is correct, and a true abstract from their books.

(S'g'd) WILLIAM L. CONYNGHAM, *Surviving Partner of Stickney & Conyngham.*

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Property.	Amount.	Int., rate & when payable.	Principal due.
51 Hester Street	$15,337.50	4½ June–Dec	June 25, 1906
160 St. & Madison Ave	5,500.00	5 Mar.–Sept.	Sept. 13, 1905
297 Henry Street	7,500.00	5 Feb.–Aug.	Feb. 1, 1905
164 St. & Morris Ave	10,000.00	4½ June–Dec	June 8, 1904
170 Clinton Street	20,000.00	4 " "	June 1, 1902
172 " "	20,000.00	4 " "	June 1, 1902
45 Perry Street	18,000.00	4 Jan.–July	July 3, 1904
47 " "	18,000.00	4 May–Nov	May 23, 1904
847 East 161st St	8,000.00	5 Mar.–Sept.	Mar. 1, 1900
849 " " "	8,000.00	5 " "	Mar. 1, 1900
255 East Broadway	15,000.00	4½ Feb.–Aug.	Feb. 1, 1897
Cauldwell Ave. & 163rd St	10,000.00	5 Ap'l–Oct.	Oct. 31, 1898
Buffington wharf, Fall River	12,500.00	4½ May–Nov.	
326 East 31st St	6,000.00	4½ Feb.–Aug.	Feb. 17, 1903
25 Acres, Eastchester	67,500.00	5 Mar.–Sept.	Mar. 28, 1904
1817 Prospect Ave	4,000.00	4½ Jan.–July	Jan. 8, 1903
47 Marblehead, Mass	1,500.00	4½ Ap'l–Oct.	Ap'l 10, 1903
86 Ludlow Street	24,000.00	5 June–Dec	June 12, 1906
147 W. 93rd Street	4,500.00	4½ Ap'l–Oct	Oct. 1, 1905
851 East 163rd St	7,000.00	5 Mar.–Sept.	Sept. 25, 1906
853 " " "	7,000.00	5 " "	Sept. 25, 1906
142 W. 128th St	7,000.00	4½ May–Nov	May 6, 1905
505 W. 27th St	20,000.00	5 Jan.–July	July 1, 1906
	$316,337.50		

Lot No.	Shares.	Description.	Book value.		Market value Dec. 19, 1903.	
			Amount.	Per share.	Per share.	Amount.
1	500	Pennsylvania	$15,453.01	$30.95	58½	$29,250.00
2	100	Pitts., C., C. & St. L. Pfd	8,487.50	84⅞	90	9,000.00
3	700	St. Paul Common	82,119.00	117⅜	141¾	99,225.00
4	500	" " Pfd	74,812.50	149⅝	172	86,000.00
5	500	Ill. Central	35,664.00	71⅜	129½	64,750.00
6	700	B. & O. Common	60,587.50	86½	78	54,600.00
7	500	" " " Pfd.	44,662.50	89⅜	88	44,000.00
8	500	Atchison Pfd	34,491.00	69	91⅞	45,937.50
9	600	Den. & Rio G. Pfd	42,300.00	70½	72½	43,500.00
10	500	Wor., Nasua. & Roch	62,433.75	124⅞	146	73,000.00
11	500	Nor. Central.....(Red figures)	20,148.81	.....	89	44,500.00
12	400	West End St. Ry	4,173.37	10½	82	32,800.00
13	1582	" Land	20,091.50	$12.70	70c.	1,107.40
14	160	Penna. Canal	1.00	.....	.....	1.00
15	200	Lytle Common	1.00	.....	.....	1.00
16	4200	" Pfd	4,101.00	.....	.....	4,101.00

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17	300	United Ry. N. J.	68,163.46	227¼	265	79,500.00
18	150	Ins. Co. Nor. Am	3,300.00	22	22	3,300.00
19	1845	Staples Coal Co	183,500.00	99½	100	184,500.00
20	600	Chic., N. W. Com.	62,456.25	104⅞	165	99,000.00
21	100	" " " Pfd.	14,312.50	143⅛	208	20,800.00
22	50	Corr. Mfg. Co.	2,500.00	50	50	2,500.00
23	300	U. S. Leather Pfd.	15,870.50	53	76	22,800.00
24	10	Van Olinda Mfg. Co.	1.00	.....	.....	1.00
25	450	Grand Rap. & Ind.	6,750.00	15	20	9,000.00
26	600	Norf. & West. Pfd.	47,687.50	79½	86	51,600.00
27	2000	Mt. Pleas. Com.	200,000.00	100	25	50,000.00
28	1000	" " Pfd.	100,000.00	100	30	30,000.00
29	200	Union Pac. Com.	16,162.50	80⅞	77¾	15,550.00
30	100	" " Pfd.	8,837.50	88⅜	88	8,800.00
31	100	Chic. & Atl. Pfd.	7,012.50	70⅛	69½	6,950.00
32	20	N. Y. Water Co.	1.00	.....	.....	1.00
33	200	So. Ry. Pfd.	15,875.00	79¾	78	15,600.00
34	100	Amer. Smelt. Pfd.	9,062.50	90⅝	92	9,200.00
35	100	Rubber Mfg. Co.	7,287.50	72⅞	71½	7,150.00
			$1,238,009.53			$1,248,024.09
		Deduct Market Value	1,227,876.09	Less figures in red		20,148.81
		Excess of Cost over Market Value	$10,133.44			$1,227,876.09

Lot No.	Quantity.	Description.	Book value.		Market value Dec. 19, 1903.	
			Amount.	Per 100.	Per 100.	Amount.
1	166	Lytle Coal Company	$166,000.00	100	75	$124,500.00
2	87	Staples Coal Co. '95	87,000.00	100	100	87,000.00
3	157	Staples Coal Co. '98	157,000.00	100	100	157,000.00
4	6	Texas Pacific 6's	6,000.00	100	100	6,000.00
5	44	U. S. 4's	51,000.00	115.9	123½	58,740.00
6	100	New York City 3½	109,000.00	109	101	101,000.00
7	10	Winona & St. P. 7's	10,750.00	107½	111	11,100.00
8	5	Ft. Worth & Den. 6's	2,875.00	57½	102½	5,125.00
9	10	St. L. & Iron Mts. 5's	7,500.00	75	111⅜	11,137.50
10	57	Texas Pac. 5's	42,862.50	75.197	114½	65,265.00
11	5	Chic., M. & St. P. 5's	5,000.00	100	116½	5,825.00
12	20	Wabash 5's	19,418.75	97.094	113¾	22,750.00
13	9½	Sunbury, H. & W. B. 5's	9,500.00	100	106	10,070.50
14	10	Bells Gap 6's	10,000.00	100	106	10,600.00
15	10	Los Angeles 4½'s	10,000.00	100	100	10,000.00
16	5	Salem 4's	5,000.00	100	100	5,000.00
17	10	Brooklyn 7's	10,000.00	100	130	13,000.00

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18	10	N. Y. & N. Eng. 7's	10,000.00	100	102½	10,250.00
19	5	Long Island 4's	4,368.75	87.375	100	5,000.00
20	20	Oregon Short 6's	19,531.25	97.656	123	24,600.00
21	37	Susq. Coal Co. 6's	35,425.00	95.743	110	40,700.00
22	25	Atchison 4's	22,431.25	89.725	99¾	24,937.50
23	130	N. Y. Central & L. S. Coll. 3½	49,387.50	38	87	113,100.00
24	30	Southern Ry. 5's	30,000.00	100	114	34,200.00
25	10	Col. Southern 4's	7,956.13	79.561	85	8,500.00
26	20	Minn. & St. L. 4's	19,100.00	95½	97	19,400.00
27	11	N. Y., Phil. & Norfolk 5's	10,000.00	91	100	11,000.00
28	30	Nor. & West 4's	28,977.50	96.592	96⅜	28,987.50
29	20	Balto. & Ohio 4's	20,000.00	100	101	20,200.00
30	50	Mo. Kan. & Texas 4's	48,212.50	96.425	96½	48,250.00
31	5	Newton 4's	5,000.00	100	100	5,000.00
32	50	Lou. & Nash. 4's	50,175.00	100	100	50,000.00
33	50	Cons. Tobacco 4's	33,875.00	67¾	56	28,000.00
34	10	Nor. & W-Poca. 4's	9,437.50	94⅜	88⅞	8,887.50
35	10	Ches. & Ohio 4½'s	10,450.00	104½	102	10,200.00
36	20	Read Co. 4's	19,225.00	96⅛	97	19,400.00
37	20	Union Pac. Conv. 4's	18,925.00	94.625	95¼	19,050.00
38	50	N. Y. 3½ due 1953	50,875.00	101	100	50,000.00
39	25	Nor. Pac. P/L 4's	22,663.75	90.655	102½	25,625.00
			$1,234,922.38			$1,309,400.00
		Deduct Cost				1,234,922.38
		Excess of Market value over Cost				$74,477.62

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OTTO KELSEY, COMPTROLLER, ETC.

52 Hildreth & Company.

Trial Balance, Dec. 19, 1903.

Cash	$7,837.78	
Merchandise	.....	$62.71
Real Estate	14,391.60	
The Nanticoke Store Co.	.....	481.27
Real Estate Rents	.....	191.32
Joseph Stickney, Capital	.....	12,196.39
" " Personal	.....	3,632.50
" " Trustee Capital	.....	8,328.53
Joseph Stickney, Trustee Personal	.....	3,042.36
Robert I. Jenks, Capital	.....	515.16
" " Personal	28.03	
Chas. S. Puckey, Capital	.....	530.50
" " Personal	40.00	
A. Lape & Co., Capital	9,500.00	
" " Personal	.....	3,152.13
Black Diamond Mills	205.80	
Rents Receivable	39.66	
	$32,042.87	$32,042.87

I hereby certify that the above Trial Balance is correct to the best of my knowledge and belief.

(S'g'd) HENRY H. PEASE.

Estate of Joseph Stickney.

Transfer Tax.

Inventory filed in Surrogate's Court, New York City, dated March 26, 1904			$1,571,875.85
Add personal property, page 2, Mr. Jenks' affidavit, verified May 9th			36,700.00
			1,608,575.85
53 Deduct items appearing in above inventory and appraisement: Capital invested in firm of Stickney & Conyngham		$1,000,000.00	
Capital invested in firm of Hildreth & Co.		50,000.00	1,050,000.00
			558,575.85
Add one-half of Capital account of Stickney & Conyngham		2,250,000.00	
One-half of excess in market value over cost of Bonds as per Sheet	$74,477.62	37,238.81	
One-half accrued interest Mortgages to Dec. 21st, 1903	3,339.67	1,669.84	
One-half profits, Stickney & Conyngham, March 1st, 1903, to Dec. 21st, 1903, as per Trial Balance herewith	261,778.44		
Additional profits subsequently ascertained	306,178.38		
Due Estate ½ of	$567,956.74	283,978.37	
Add revised appraisal, Hildreth & Co. representing unliquidated assets exclusive of real estate in Pennsylvania and 450 shares Nanticoke Store Co. stock		25,000.00	2,597,887.02
			3,156,462.87

54 Deduct one-half of the following items from Balance sheet of Stickney & Conyngham, herewith, viz.:

Real Estate:			
New York	$258,417.90		
Penna	133,950.52		
½ of	$392,368.42	$196,184.21	
Deduct market value of stocks as per sheet:			
½ of	$10,133.44	5,066.72	
Deduct on notes of Lytle Coal Co as per Trial Balance of Stickney & Conyngham, par value, $246,000. Estate's interest ½ $123,000.			
Values @ 50 %		61,500.00	262,750.93
			2,893,711.94
Less Debts		10,440.96	
Funeral Expenses		2,521.86	
Executors' Expenses and Attorneys' Fees		21,243.90	
Three Executors' Commissions		87,381.36	121,588.08
			$2,772,123.86
Tax computed as follows:			
On $380,000.00 legacies @ 5 %		19,000.00	
On $2,392,123.86 @ 1 %		23,921.24	
		42,921.24	
Less 5 %		2,146.06	
		$40,775.18	

55 *Affidavit of Edward Mitchell.*

Surrogate's Court, County of New York.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

STATE OF NEW YORK, *County of New York*, ss:

Edward Mitchell, being duly sworn, deposes and says as follows:

He is an attorney and counsellor at law residing at No. 31 East 50th Street, and having an office at Nos. 44 & 46 Wall Street.

He was attorney and counsel for Joseph Stickney in his lifetime and he has been the attorney and counsel for the Executors of said Joseph Stickney since his death.

From communications had with Joseph Stickney in his life-time and with his Executors since his death, this deponent has been informed and believes that the real property in the Borough of The Bronx, City of New York, set forth at length in the affidavit of Robert I. Jenks, the title to which was held by Joseph Stickney in his life-time, was purchased with the assets of the firm of Stickney and Conyngham with the knowledge and consent of said firm, the

title being taken in the name of Joseph Stickney alone for purposes of convenience.

Since the death of said Joseph Stickney and by the in-
56 structions of his widow, Carolyn Foster Stickney, and of his Executors, that one-half of said real property belonged to William L. Conyngham, this deponent has prepared a deed which has been executed and delivered by his widow and his Executors conveying one equal undivided half part of said real property in the Borough of The Bronx to William L. Conyngham, the deed therefor being dated the thirteenth day of May, 1904, and recorded in the Office of the Register of the County of New York on the 13th day of May, A. D. 1904, at 3 o'clock P. M. in Block Series (Conveyances), Section 9, Liber 50, page 197, and indexed under Block Number 2466 on the Land Map of the City of New York, and also in Liber 36, page 137, of Conveyances affecting District Annexed by Chapter 934 of the Laws of 1895.

Carolyn Foster Stickney, the widow of said Joseph Stickney, is at present abroad and is not expected to return to this country until some months hence.

At the time the inventory and appraisement, dated March 26, 1904, and filed in the Surrogate's office and annexed to the affidavit of Robert I. Jenks in this matter, were being made, this deponent advised Mrs. Stickney that she should inform the appraisers as to furniture, etc., at 874 Fifth Avenue, the carriages, &c. at 112 West 56th Street, the furniture, &c., at "Ballyhoo," and the furniture, &c., at Jekyl Island which belonged to Mr. Stickney at the date of his death, and also state as near as she might be able her estimate of the value of the same.

This deponent believes that the value of these articles as set forth in the said inventory and appraisement dated March 26, 1904, are substantially true and correct values of the same.

This deponent has no knowledge or information as to the value of the yacht "Susquehanna," but he has seen a trial balance of said Joseph Stickney's personal books of account and he knows that the yacht "Susquehanna" was valued by said Joseph Stickney on his personal books of account at the amount set forth in the affidavit of Robert I. Jenks, and he is informed and believes that said
57 yacht is more than seventeen years old and that yachts have no "market" value.

(S'd) EDW'D MITCHELL.

Sworn to before me this 6th day of July, 1904.

LEON MALRAISON,
Notary Public, New York County, N. Y.

Minutes of Proceedings Before Transfer Tax Appraiser.

Surrogate's Court, County of New York.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of JOSEPH STICKNEY, Deceased.

Hearing held before the Appraiser James Yereance, on July 12th, 1904, at 3 o'clock in the afternoon, at Room 1404, Home Life Building, 256 Broadway, Borough of Manhattan, City of New York.

Appearances.

Hon. Edward H. Fallows (By Geo. M. Judd, Esq.), Attorney for State Comptroller.

Hon. Edward Mitchell, Attorney for Executors and for Carolyn F. Stickney, legatee and devisee.

Robert I. Jenks, Esq., Executor.

By Mr. JUDD: The attorney for the executors has protested
58 against the taxation of the real estate belonging to the decedent passing to persons of the one per cent. class, for the reasons given in the affidavit of the executor. I, therefore, in this connection, offer in evidence a certified copy of Chapter 41 of the Laws of 1903, as filed in the office of the Secretary of State, also certified copies of the original certificates of the presiding officers of the Senate and Assembly, as attached to said bill on file in the said Secretary of State's office; also certified copies of amended certificates of the presiding officers of the Senate and Assembly, as attached to said bill on file in the Secretary of State's office; also certified copies of the affidavits of each of the presiding officers of the Senate and Assembly, giving their reasons for filing such amended certificates.

By Mr. MITCHELL: I object to receiving in evidence any part of the paper respecting Chapter 41 of the Laws of 1903, except the certificates of the presiding officers of the Senate and Assembly originally affixed thereto. I object that the so-called amended certificates which are dated the one by Mr. Nixon as Speaker, March 11th, 1903, is a false certificate in this respect: That the affidavit of Mr. Nixon shows that such certificate was made by him at some time in June, 1904; that the alleged amended certificate reads "by order of the Assembly, S. F. Nixon, Speaker," and that in 1904 the Assembly of 1903 had ceased to exist, and Mr. Nixon had ceased to be the Speaker of the Assembly of 1903 prior to January 1, 1904; that neither of the pretended alleged certificates of the Speaker of the Assembly nor the President of the Senate is authorized by any law, or has any validity or effect whatever. I object, further, that, under the executive law, the duty of the Secretary of State, by Section 22, is declared to be that "the Secretary of State shall have the custody of all laws, and shall properly arrange and preserve them"; that the act of the Secretary of State or his Deputy in appending to Chapter 41 of the Laws of 1903, certificates by the Speaker and

President, known by him to have been made in 1904, was a
59 mutilation of the records of the laws which it was his duty to preserve in his office unimpaired, and I move to strike out and exclude from consideration of the Appraiser, and out of the record of this proceeding, all that part of the paper offered by counsel for the Comptroller which does not conform to the original record of the Act as originally filed in the Secretary of State's office.

By Mr. JUDD: The State takes the position that these amended certificates are made *nunc pro tunc* as of the date of the passage of the law, the same as the original certificates, and that the original officer of each house, both of whom are now living, have the right, at any time, to make such amended certificates as such officers, on the date when the bill was originally passed in each house.

By Mr. MITCHELL: The counsel for the executors and Mrs. Stickney objects that there is no law and there is no custom or precedent for the filing, more than a year after the bill has been passed, certificates of officers *whom* terms of office have expired, who have already performed their duties in making one certificate which is required by law, and whose power has ceased when that certificate was made, as justification for presenting to this Court these alleged amended certificates.

By Mr. YEREANCE: The Appraiser must overrule the objection. Exception.

(Paper received and marked "Comptroller's Exhibit No. 1.)

By Mr. MITCHELL: I desire, in this connection, also to call your attention to Chapter 41 of the Laws of 1903, as published in the Session Laws under the authority of the Secretary of State, which shows that a majority only was present and not three-fifths, and that, under the legislative law, this is presumptive evidence that three-fifths were not present. I desire also to offer in evidence a certified copy made by the Secretary of State, and dated April 12, 1904, of Chapter 41 of the Laws of 1903, and of the certificates of the Presi-
60 dent of the Senate and of the Speaker of the Assembly, which are appended to the original act then on file in the office of the Secretary of State, this paper having been received by me on April 13, 1904, from the office of the Secretary of State in Albany, New York.

(Marked Executor's Exhibit A.)

By Mr. JUDD: I further offer in evidence, in this connection, certified copy of extract from the Senate Journal of Thursday, February 26th, 1903, showing that Chapter 41 of the Laws of 1903 was passed, three-fifths of the members elected to the Senate being present.

By Mr. MITCHELL: May I ask whether that is a copy of the printed journal?

By Mr. JUDD: That I cannot tell you.

By Mr. MITCHELL: May I ask whether there is any manuscript journal?

By Mr. JUDD: That I cannot tell you.

By Mr. MITCHELL: I object, on the ground that the paper offered is incompetent, irrelevant and immaterial; that the original Senate Journal, if produced, is not a record either at common law or by

statute, and cannot be introduced in evidence, and cannot be resorted to by the Court for the purpose either of validating or impeaching any law, and that the legislative law makes the certificates of the presiding officers conclusive evidence as to whether the majority were present or three-fifths, and the conclusive evidence is that there was only a majority present and not three-fifths.

Objection overruled by the Appraiser.

Exception.

(Paper marked Comptroller's Exhibit #2.)

By Mr. JUDD: I further offer in evidence in this connection a certified copy of an extract from the Assembly Journal of Wednesday, March 11, 1903, on final passage, of Chapter 41 of the Laws of 1903, showing that three-fifths of all the members elected to the Assembly were present on that occasion.

61 By Mr. MITCHELL: I make the same objection to that as I did to the copy of the Journal of the Senate, and the same objection if the original were produced.

Objection overruled by the Appraiser.

Exception.

(Paper marked Comptroller's Exhibit #3.)

By Mr. JUDD: I also offer in evidence the affidavit of Alfred E. Marling, verified July 5th, 1904, showing the market value as of December 21, 1903, the date of decedent's death, of the following premises:

First. Plot of land located at the southwesterly corner of Eastchester Road and Boston Post Road, in the Borough of the Bronx, and distinguished on the Map of the Commissioners of Taxes and Assessments of the City of New York, as Lot No. 2 in Plot No. 4, Volume 12, Ward 24, in the Borough of the Bronx, containing about 50 acres.

Second. Plot of land on the southwesterly side of Corsa Avenue, or Eastchester Road, near Fifth Street, Wakefield, and distinguished on the Map of the Commissioners of Taxes and Assessments of the City of New York, as Lot No. 1, Plot No. 2, Volume 10, Ward 24, Borough of the Bronx, containing about 51.884 acres.

By Mr. MITCHELL: I object to the appraiser receiving any evidence in regard to the value of the real estate, or of appraising any real estate in this proceeding for the purpose of this transfer tax, on the ground that there is no valid law which imposes any tax on real estate passing from a husband to a widow.

Objection overruled by the Appraiser.

Exception.

(Paper marked Comptroller's Exhibit No. 4.)

By Mr. JUDD: I also offer in evidence the affidavit of Alfred E. Marling, verified June 9th, 1904, showing the market value as of December 21, 1903, the date of the decedent's death, of the following premises: No. 112 West 56th Street, and No. 874 Fifth Avenue, Borough of Manhattan, New York City.

62 By Mr. MITCHELL: I make the same objection to the appraisal of this appraiser and to the appraising of this real

estate and any other real estate in this matter that I did to the last appraisal.

Objection overruled by the Appraiser.

Exception.

(Marked Comptroller's Exhibit # 5.)

Hearing Closed.

Report of Transfer Tax Appraiser.

Surrogate's Court, County of New York.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of JOSEPH STICKNEY, Deceased.

To the Surrogate's Court of the County of New York:

I, James Yereance, who was by an order of Honorable Frank T. Fitzgerald, one of the Surrogates of the County of New York, made and entered on the 14th day of April, 1904 (certified copy of which order is hereto annexed), directed to Act as Appraiser pursuant to Chapter 908 of the Laws of 1896, and the Acts amendatory thereof and supplemental thereto, do respectfully report:

FIRST. Having filed my oath of office in the State Comp-
63 troller's Office, pursuant to Chapter 173 of the Laws of 1901, I gave notice by mail, postage prepaid, to all persons known to have or claim an interest in all property subject to the tax imposed by said Law, to wit: to the following persons, being those named in the petition for said order, of the time and place at which I would appraise the property of Joseph Stickney, deceased, subject to the payment of said tax; a true copy of said notice is also hereto attached:

Hon. Edward H. Fallows,
Mitchell & Mitchell,
Carolyn Foster Stickney,
Mary T. Stickney,
Ella T. Stickney,
Harriet S. Jenks,
Olivia G. Moulton,
Charles S. Boardman,
Rebecca L. Armington,
Lucretia S. Waterman,
Charles F. Osgood,
Robert C. Osgood,
Mark J. Osgood,
Herbert S. Osgood,
Lillian A. Osgood,
Charles F. Osgood,
John G. Moran,
Albert C. Gibson,
B. Walker Peterson,
Mary F. Gibson,

Ruth A. Gibson,
Adelaide M. Gibson,
Mary T. Gibson,
Cora I. Gibson,
George B. Osgood,
Lucretia O. Bailey,
Mary L. J. Paige,
Allen M. Jenks,
Robert I. Jenks,
The Home for Friendless Children of Wilkesbarre, Penn.,
The Wilkesbarre City Hospital,
The Centennial Home for the Aged of Concord,
64 The Margaret Pillsbury General Hospital of Concord,
The Charity Organization Society of the City of New York,
John G. Hannah.

SECOND. I further report that at the time and place in said notice stated, to wit, on the 7th day of June, 1904, at 10:30 o'clock in the forenoon, at Room 1404 Home Life Building, 256 Broadway, Borough of Manhattan, New York City, and at other and subsequent times and at divers places, I appraised the estate of Joseph Stickney, deceased, subject to tax herein, at its fair market value on the 21st day of December, 1903, the date of his death, as follows:

Real Property.

Premises No. 112 West 56th Street, Borough of Manhattan, New York City, appraised at.....	$35,000.00
Premises No. 874 Fifth Avenue, Borough of Manhattan, New York City, appraised at.....	450,000.00

Decedent also died seized of an undivided one-half interest in the following real estate situate in the Borough of the Bronx, New York City, to wit:

Property on the southside of East 169th Street, as follows:

Section.	Block.	Lot.	Value.
9	2466	15	$1,200.00
9	2466	24	900.00
9	2466	25	900.00

Property situate in Laconia Park, as follows:—

65

Ward.	Volume.	Lot No.	
24	10	36	$200.00
24	10	37	200.00
24	10	38	200.00
24	10	39	200.00
24	10	40	200.00
24	10	41	200.00

Ward.	Volume.	Lot No.	
24	10	42	200.00
24	10	15	200.00
24	10	16	200.00
24	10	1	300.00
24	10	2	300.00
24	10	11	200.00
24	10	12	200.00
24	10	13	200.00
24	10	14	1,500.00
24	10	34	200.00
24	10	35	200.00
24	10	316	450.00
24	10	317	300.00
24	10	318	325.00
24	10	319	350.00
24	10	320	500.00
24	10	321	500.00
24	10	322	325.00
24	10	323	300.00
24	10	324	275.00
24	10	325	250.00
24	10	326	300.00
24	10	342	400.00
24	10	1 (Pl. 2)	181,594.00
24	12	2 (Pl. 4)	150,000.00
24	10	343	275.00
24	10	344	275.00
24	10	345	275.00
24	10	346	275.00
24	10	347	275.00
24	10	348	275.00
24	10	349	275.00
24	10	350	275.00
66			
24	10	351	275.00
24	10	352	400.00
24	10	353	400.00
24	10	354	400.00
24	10	355	350.00
24	10	356	300.00
24	10	357	275.00
24	10	358	250.00
24	10	359	300.00

Property situate in Wakefield, as follows:

Ward.	Volume.	Lot No.	
24	10	G 77	1,500.00
24	10	G 73	300.00
24	10	G 80–1	250.00

Ward.	Volume.	Lot No.	
24	10	G 80–3	100.00
24	10	155	1,200.00
24	10	157	1,200.00
24	10	160	1,200.00
24	10	161	1,200.00
24	10	164	1,200.00
24	10	165–3	600.00
24	10	169	1,200.00
24	10	176	1,600.00
24	10	G 81	700.00
24	10	G 82	800.00
24	10	G 83	800.00
24	10	G 84	500.00
24	10	G 85	2,100.00
24	10	G 86	400.00

Total Valuation..... $365,769.00

Decedent's one-half interest therein being..... $182,884.50

Gross Real Property..... $667,884.50

67 *Personal Property.*

$30,000 bonds of the Lytle Coal Co., 5 %, due 1910, 1912 and 1916, at 75.....	$22,500.00
$24,000 bonds of the Susquehanna Coal Co., 6%, due 1911, at 110.....	26,400.00
$5,000 bonds of the Missouri Pacific Railway Co., 5%, due 1938, at 111.....	5,550.00
$5,000 bonds of the Long Island City & Flushing Railroad Co., 6 %, due 1911, at 110.....	5,500.00
$4,000 bonds of the Oregon Short Line Railroad Co., 6 %, due 1922, at 123.....	4,920.00
$14,000 bonds of the Fort Worth & Denver City Railroad Co., 6 %, due 1921, at 103.....	14,420.00
$5,000 bonds of the Northern Pacific Railway Co., 4 %, due 1997, at 103.....	5,150.00
$10,000 bonds of the Chesapeake & Ohio Railway Co., 4½ %, due 1992, at 102¼.....	10,212.50
$500 bonds of the American Yacht Club, 4 %, due 1908, at 80.....	400.00
$5,000 bonds of the Jekyl Island Club, at 4½ %, due 1930, at 50.....	2,500.00
6,500 shares of common stock of the Mount Pleasant Hotel Co., par $100, at 25.....	162,500.00
2,597 shares of preferred stock of the Mount Pleasant Hotel Co., par $100, at 30.....	77,910.00
68 30 shares of the capital stock of the Grand Rapids & Indiana Railway Co., par $100, at 33⅓.	1,000.00
1 share of the capital stock of the Sans Souci Association, par $5,000, at 50.....	2,500.00
1 share of the capital stock of the Jekyl Island Club, par $600, at par.....	600.00
⅓ interest in 9 shares of the capital stock of the Jekyl Island Club, par $5,400, at par.....	1,800.00
⅓ interest in 1 share of the capital stock of the Jekyl Island Club, par $600, at par.....	200.00

	5 shares of the capital stock of the Westchester County Horse Show, par $10, at 2 %	1.00	
	25 shares of the capital stock of the Concord Shoe Factory, par $100, at 25	625.00	
	3 shares of the capital stock of the Pennsylvania Canal Co., par $50 (No value)		
	Note of John T. Dutcher	200.00	
	Accrued interest	2.67	
	Amount due from Stickney & Conyngham, representing capital invested in business, appraised at	2,310,136.09	
	Amount due from Hildreth & Company, representing capital invested in business, appraised at	25,000.00	
	Balance of Personal Account with Stickney & Conyngham	110,545.42	
69	Amount due from Hildreth & Company	3,632.50	
	Amount due from James H. Goodrich	5.00	
	Amount due from F. J. Deemer	.89	
	Cash on deposit with the National Bank of Commerce	51,896.53	
	Cash on deposit with Grant & Company	333.46	
	Cash on hand	793.55	
	Furniture, beds and bedding, paintings, silverware, bric-a-brac and all other household goods at 874 Fifth Avenue	10,000.00	
	Carriages, Horses, Harness and Equippages in stable at No. 112 West 56th Street	1,000.00	
	Furniture, beds and bedding, paintings, silverware, bric-a-brac, and all other household goods in house "Ballyhoo," Williamsbridge, Bronx, New York City, and contents of stable at same place	5,000.00	
	Policy of life insurance of the New England Mutual Life Insurance Company	2,000.00	
	Note of Frank B. Arnington	15,000.00	
	Accrued interest	656.25	
	Note of James H. Goodrich	100.00	
	Accrued interest	8.25	
	Note of Mary F. Colley	100.00	
	Accrued interest	.38	
	Steam Yacht "Susquehanna," and contents	20,000.00	
	Contents of stable at Mount Pleasant, New Hampshire	500.00	
70	Furniture, etc., at Jekyl Island	1,000.00	
	Gross Personal Estate		$2,902,599.49
	Gross Estate, Real and Personal		$3,570,483.99

I further report that said gross estate is subject to the following deductions:—

Debts of decedent	$10,440.96	
Funeral expenses	2,521.86	
Administration expenses	21,243.90	
Executors' Commissions (3)	87,647.97	
Total Deductions		121,854.69
Leaving a Net Estate, Real & Personal, of		$3,448,629.30

THIRD. I further report that Joseph Stickney died on the 21st day of December, 1903, being at the time of his death a resident of the City, County and State of New York; that said decedent left a last will and testament, copy of which is hereto annexed, which was duly admitted to probate by the Surrogate's Court of the County of New York, and Letters Testamentary thereon were issued by said

Court on the 29th day of December, 1903, to Carolyn Foster Stickney, of No. 874 Fifth Avenue, and to Robert I. Jenks and John G. Hannah, both of No. 1 Broadway, all of the Borough of Manhattan, City of New York, as Executors.

Under and pursuant to the terms of the will of the decedent, said net estate is distributed as follows:—

Carolyn Foster Stickney, wife, Real Estate, No. 874 Fifth Avenue, New York City....	$450,000.00	
Contents of No. 874 Fifth Avenue, New York City.....	10,000.00	
71 Stable at No. 112 West 56th Street, New York City.....	35,000.00	
Contents of stable at No. 112 West 56th Street, New York City.....	1,000.00	
		$496,000.00
Mary T. Stickney, no relation, Cash legacy.....		5,000.00
Ella T. Stickney, niece, Cash legacy.....		100,000.00
Harriet S. Jenks, cousin, Cash legacy.....		10,000.00
Rebecca L. Armington, cousin, Cash legacy.....		10,000.00
Olivia G. Moulton, cousin, Cash legacy.....		10,000.00
Charles S. Boardman, cousin, Cash legacy.....		10,000.00
Lucretia S. Waterman, cousin, Cash legacy.....		10,000.00
Charles F. Osgood, cousin, Cash legacy.....		5,000.00
Robert C. Osgood, cousin, Cash legacy.....		1,000.00
Mark J. Osgood, cousin, Cash legacy.....		1,000.00
Herbert S. Osgood, cousin, Cash legacy.....		1,000.00
Lillian A. Osgood, cousin, Cash legacy.....		1,000.00
Charles F. Osgood, cousin, Cash legacy.....		1,000.00
John G. Moran, cousin, Cash legacy.....		10,000.00
Albert C. Gibson, cousin Cash legacy.....		10,000.00
B. Walker Peterson, cousin, Cash legacy.....		10,000.00
72 Mary F. Gibson, cousin, Cash legacy.....		10,000.00

Ruth A. Gibson, cousin, Cash legacy	2,500.00
Adelaide M. Gibson, cousin, Cash legacy	2,500.00
Mary T. Gibson, cousin, Cash legacy	2,500.00
Cora I. Gibson, cousin, Cash legacy	2,500.00
George B. Osgood, cousin, Cash legacy	10,000.00
Lucretia O. Bailey, cousin, Cash legacy	10,000.00
Mary L. J. Paige, cousin, Cash legacy	10,000.00
Allen M. Jenks, cousin, Cash legacy	10,000.00
Robert I. Jenks, cousin, Cash legacy	100,000.00
The Home for Friendless Children of Wilkesbarre, Pennsylvania, Cash legacy	5,000.00
The Wilkesbarre City Hospital, Cash legacy	5,000.00
The Centennial Home for the Aged of Concord, N. H., Cash legacy	5,000.00
The Margaret Pillsbury General Hospital of Concord, N. H., Cash legacy	5,000.00
The Charity Organization Society of the City of New York, Cash legacy	5,000.00
Total Specific Bequests	$876,000.00

Leaving a residuary estate of $2,572,629.30, which, under the terms of the will and at her election, passes to Carolyn Foster Stickney, decedent's wife.

73 FOURTH. I further report that all the persons interested in this estate are of full age and sound mind, except Robert C. Osgood, an infant over the age of fourteen years, and Mark J. Osgood, Herbert S. Osgood, Lillian A. Osgood and Charles F. Osgood, infants under the age of fourteen years.

FIFTH. I further report the following appearances:

Hon. Edward H. Fallows, Attorney for State Controller.

Mitchell & Mitchell, Esqs., Attorneys for Executors.

SIXTH. I further report that I appraised the estate of Joseph Stickney, deceased, subject to tax herein, at its fair market value on the 21st day of December, 1903, the date of his death, as follows:

Carolyn Foster Stickney, wife, Interest in estate	$3,068,629.30
Mary T. Stickney, no relation, Interest in estate	5,000.00
Ella T. Stickney, niece, Interest in estate	100,000.00
Harriet S. Jenks, cousin, Interest in estate	10,000.00
Rebecca L. Armington, cousin, Interest in estate	10,000.00
Olivia G. Moulton, cousin, Interest in estate	10,000.00
Charles S. Boardman, cousin, Interest in estate	10,000.00
Lucretia S. Waterman, cousin, Interest in estate	10,000.00
Charles F. Osgood, cousin, Interest in estate	5,000.00
Robert C. Osgood, cousin, Interest in estate	1,000.00
Mark J. Osgood, cousin, Interest in estate	1,000.00
Herbert S. Osgood, cousin, Interest in estate	1,000.00
74 Lillian A. Osgood, cousin, Interest in estate	1,000.00
Charles F. Osgood, cousin, Interest in estate	1,000.00
John G. Moran, cousin, Interest in estate	10,000.00
Albert C. Gibson, cousin, Interest in estate	10,000.00
B. Walker Peterson, cousin, Interest in estate	10,000.00
Mary F. Gibson, cousin, Interest in estate	10,000.00
Ruth A. Gibson, cousin, Interest in estate	2,500.00
Adelaide M. Gibson, cousin, Interest in estate	2,500.00
Mary T. Gibson, cousin, Interest in estate	2,500.00
Cora I. Gibson, cousin, Interest in estate	2,500.00
George B. Osgood, cousin, Interest in estate	10,000.00
Lucretia O. Bailey, cousin, Interest in estate	10,000.00
Mary L. J. Paige, cousin, Interest in estate	10,000.00

Allen M. Jenks, cousin, Interest in estate	10,000.00
Robert I. Jenks, cousin, Interest in estate	100,000.00
The Home for Friendless Children of Wilkesbarre, Pennsylvania, Interest in estate	5,000.00
The Wilkesbarre City Hospital, Interest in estate	5,000.00
The Centennial Home for the Aged of Concord, N. H., Interest in estate	5,000.00
The Margaret Pillsbury General Hospital of Concord, N. H., Interest in estate	5,000.00
75 The Charity Organization Society of the City of New York, Interest in estate	5,000.00

Respectfully submitted,

JAMES YEARANCE, *Appraiser.*

Dated, New York City, October 12, 1904.

Filed Oct. 14, 1904.

Report of Sydney P. Ward, Accountant for Comptroller.

NEW YORK, *June* 15, 1904.

Edward H. Fallows, Esq., 170 Broadway, New York City.

DEAR SIR: In the Matter of the Transfer Tax upon the Estate of Joseph Stickney, deceased, December 21, 1903, I have made a critical examination of the Deceased's Co-partnership interest in the Firm of Stickney & Conyngham as at the close of business, Saturday, December 19, 1903. In substance and reality this firm was a Banking House. The Trial Balance was checked and verified and the nominal accounts comprising the Interim Profit and Loss as at date of death, and subsequently the final Profit and Loss not closing until on or about March 1, 1904, were scrutinized by me with great care. The ascertained Assets and Liabilities are as follows:

Assets.

Bonds	Schedule # 1...	$1,234,922.38
Stocks	" # 2...	1,238,009.53
Mortgages	" # 3...	316,337.60
Capital invested in Firms		765,237.15
Notes Receivable		353,100.00
76 Book Accts. do.		287,166.83
Cash		437,284.26
Real Estate (County of New York)		258,417.90
Coal Lands, Pennsylvania		139,950.52
		$5,024,426.07

Liabilities.

Book Accts. payable	$84,064.36
Deposit Account (2% P. A.)	12,372.10
Suspense do.	698.24
Due Deceased Personal Account (Excluding Interest)..	102,699.12
Due Surviving Partner Personal Acct	66,722.37
Interim Profits Earned to date of death of Decedent...	257,969.88
Capital Accounts	4,500,000.00
	$5,024,426.07

Of course the foregoing are necessarily subject to final adjustment involving the following: 1st. Market values of Bonds and Stocks; 2nd. Accrued Interest on Mortgages Receivable; 3rd. Division of final profits per Condensed Statement presented herewith; 4th. Deduction of Coal Lands in Pennsylvania, and 5th. the Claims of Executors submitted to me and which I thoroughly investigated, for depreciation of Bonds and Stocks not listed (Coal Firms etc.) and Notes Receivable.

Capital Account of Deceased.

Co-partnership valued per Ledger 50%		$2,250,000.00
1st. Bonds Market Value Schedule #1..	$1,309.400	
Ledger Market Value per Schedule #1..	1,234,922.38	
50% of Increase	$74,477.62	37,238.81
		$2,287,238.81
77 Less Stocks, Ledger Value per Schedule #2	$1,238,009.53	
Market Ledger Value per Schedule #2..	1,227,876.09	
50% of Decrease	$10,133.44	5,066.72
		$2,282,172.09
2nd. Accrued Interest on Mortgages 50% of $3,339.87..		1,669.84

3rd. Division of final Profits as follows:

Receipts.

From Freights, Commissions, Dividends, Interests, Capital Invested in Firms, Royalties Coal Lands and Sundries....	$646,228.54

Disbursements.

For Expenses and Salaries New York and Wilkesbarre, Pa., Maintenance Real Estate New York (from which there is no income).....	69,036.73	
	$577,191.81	
Less Special Salaries to Employees 1. 6–10.	9,235.07	
	$567,956.74	
Deceased's Share 50%.....		283,978.37
		$2,567,820.30
4th. Deduction of 50% from Coal Lands $139,950.52...		66,975.26
78		$2,500,845.04
5th. And subject and to restore to ledger value the following Unlisted Bonds and Stocks:		
A. Lot No. 1 Schedule No. 1 166 Bonds Lytle Coal Co. from $124,500. to 166,000. Shares 50% of difference..		$20,750.00
B. Lot No. 27 Schedule No. 2 2,000 Shares Mt. Pleasant Hotel Co. Common Lot No. 28 Schedule No. 2 1,000 Shares Mt. Pleasant Hotel Co. Preferred from a total of $80,000 to 300,000 Shares 50% of difference.		110,000.00
Value of Deceased's Interest per Ledger.....		$2,631,595.04

Yours truly, SYDNEY P. WARD.

SCHEDULE No. 1.

In re Estate of JOSEPH STICKNEY, Deceased.

Bonds, Firm Assets—Stickney & Conyngham.

Market Values or Best Ascertained Values of Bonds, December 19, 1903.

Lot.	Bonds.	Names.	Ledger value.	Market value.	Total market value.
1	166	Lytle Coal Co. 5 % S. F.....	166000 00	75	124500 00
2	87	Staples do. De B. 1895.....	87000 00	100	87000 00
3	157	Do. do. do. 1898.....	157000 00	100	157000 00
4	6	Texas Pacific 1st 6 %.....	6000 00	100	6000 00
5	44	U. S. 4 %, due 1925.....	51000 00	133½	58740 00
6	100	N. Y. City Hall of Records 3 %..	109000 00	101	101000 00
7	10	Winona & St. Peter 7 %.....	10750 00	111	11100 00
8	5	Ft. Worth & Denver City 1st 6 %.	2875 00	102½	5125 00
9	10	St. Louis & Iron Mt. 5 %.....	7500 00	111⅜	11137 50
10	57	Texas Pacific 5 %.....	42862 50	114½	65265 00
11	5	Chicago, Mo., St. P. & W. Div. 5 %	5000 00	116½	5825 00
12	20	Wabash 1st 5 %.....	19418 75	113¾	22750 00
79					
13	9½	Sunbury, H. & Wilkesbarre 5 %.	7500 00	106	10070 00
14	10	Bells Gap 1st 6 %.....	10000 09	106	10600 00
15	10	City of Los Angeles, Cal., 4½ %...	10000 00	100	10000 00
16	5	City of Salem, Mass., 4% Sewers.	5000 00	100	5000 00
17	10	City of Brooklyn 7 %.....	10000 00	130	13000 00
18	10	N. Y. & N. E. 1st 7 %.....	10000 00	102½	10250 00
19	5	L. I. R. R. General 4 %.....	4368 75	100	5000 00
20	20	Oregon Short Line 1st 6 %.....	19531 25	123	24600 00
21	37	Susquehanna Coal Co. 1st 6 %....	35425 00	110	40700 00
22	25	Atchison, Topeka & S. F. 4 %....	22431 25	99⅞	24937 50
23	130	N. Y. C. & H. R. 3½ % Reg.....	49387 50	87	113100 00
24	30	Southern Ry. Co. 5 %.....	30000 00	114	34200 00
25	10	Colorado & Southern 4 %.....	7956 13	85	8500 00
26	20	Minneapolis & St. L. 1st Ref. 4 %.	19100 00	97	19400 00
27	11	N. Y., Phila. & Norfolk 4 %.....	10000 00	100	11000 00
28	30	Norfolk & W. R. R. 4 %.....	28977 50	96⅝	28987 50
29	20	Baltimore & O. R. R. 4 %.	20000 00	101	20200 00
30	50	Missouri, Kansas & Texas 4 %...	48212 50	96½	48250 00
31	5	City of Newtown, Mass., Highway 4 %.....	5000 00	100	5000 00
32	50	Louisville & Nashville 4 %.....	50175 00	100	50000 00
33	50	Continental Tobacco 4 %.....	33875 00	56	28000 00
34	10	Norfolk & W. Ry. Pocahontas 4 %	9437 50	88⅞	8887 50
35	10	Chesapeake & Ohio 4 %...	10450 00	102	10200 00
36	20	Reading Co. 4 %.....	19228 00	97	19400 00
37	20	Union Pacific Con. H. 4 %... ..	18925 00	95¼	19050 00
38	50	N. Y. City Bonds 3½, due 1953...	50875 00	100	50000 00
39	25	N. P. Prior Lien R. & L. G. 4 %.	22663 75	102½	25625 00
	1349½	.....	$1234922 38	.....	$1309400 00

80 SCHEDULE No. 2.

In re Estate of JOSEPH STICKNEY, Deceased.

Stocks, Firm Assets—Stickney & Conyngham.

Market Values or Best Ascertained Values of Stocks, December 19, 1903.

Lot No.	Stocks.	Names.	Ledger value.	Market value.	Total market value.
1	500	Pennsylvania R. R.....	15453 01	58½	$29250 00 $50 Shares
2	100	Pgh. Cinn. C. & St. L. Pfd.....	8487 50	90	9000 00
3	700	Chicago, M. St. Paul Com.....	82119 00	141¾	99225 00
4	500	Chicago, M. St. Paul Pfd.....	74812 50	172	86000 00
5	500	Illinois Central Ry.....	35664 00	129½	64750 00
6	700	Baltimore & O. Com....	60587 50	78	54600 00
7	500	" " Pfd.....	44662 50	68	44000 00
8	500	Atchison, T. & St. F. Pfd.....	34491 00	91¾	45937 50
9	600	Denver & R. G. Pfd....	42300 00	72½	43500 00
10	500	Worcester, N. & Rochester.....	62433 75	146	73000 00
11	500	Northern Central Ry...	20148 81	89Cr.	44500 00 $50 Shares
12	400	Prior Lien W. E. Street Ry. & L. Co.....	4173 37	82	32800 00
13	1582	Land Lien W. E. Street Ry. & L. Co.....	20091 50	70	1107 40 $25 "
14	160	Pennsylvania Canal....	1 00	.....	1 00
15	200	Lytle Coal Co. Com....	1 00	.....	1 00
16	4200	" " Pfd.....	4101 00	.....	4101 00
17	300	United R. R. of N. J...	68163 46	265	79500 00
18	150	Insurance Co. of N. A..	3300 00	22	3300 00 $25 "
19	1845	Staples Coal Co.....	183500 00	100	184500 00
20	600	Chicago & N. W. Com..	62456 25	165	99000 00
21	100	" " Pfd...	14312 50	208	20800 00
22	50	Corr Mfg. Co.....	2500 00	50	2500 00
23	300	U. S. Leather Pfd.....	15870 50	76	22800 00
24	10	Van Olinda Mfg. Co....	1 00	.....	1 00
25	450	Grand Rapids & I. Ry..	6750 00	20	9000 00
26	600	Norfolk & W. Ry. Pfd..	47687 50	86	51600 00
27	2000	Mt. Pleasant Hotel Co. Com.	200000 00	25	50000 00
28	1000	Mt. Pleasant Hotel Co. Pfd.....	100000 00	30	30000 00
29	200	Union Pacific Com.....	16162 50	77¾	15550 00
30	100	" " Pfd.....	8837 50	88	8800 00
31	100	Chicago & Alton Pfd. ..	7012 50	69½	6950 00
32	20	N. Y. Water Co.....	1 00	.....	1 00
33	200	Southern Ry. Pfd.....	15875 00	78	15600 00
34	100	American Smelters Pfd.	9062 50	92	9200 00
35	100	Rubber Mfg. Pfd.....	7287 50	71½	7150 00
	20367	.....	$1258158 34	.....	$1248024 90
		Credit.....	20148 81	Credit.	20148 81
			$1238008 53	.....	$1227876 09

81 SCHEDULE No. 3.

In re Estate JOSEPH STICKNEY, Deceased.

Mortgages Receivable, Firm Assets—Stickney & Conyngham.

No.	Amount Mortgage.
1	$15337 50
2	5500 00
3	7500 00
4	10000 00
5	20000 00
6	20000 00
7	18000 00
8	18000 00
9	8000 00
10	8000 00
11	15000 00
12	10000 00
13	12500 00
14	6000 00
15	67500 00
16	4000 00
17	1500 00
18	24000 00
19	4500 00
20	7000 00
21	7000 00
22	7000 00
23	20000 00
	$316337 50

82 *Supplementary Report of Sydney P. Ward, Account for Comptroller.*

NEW YORK, *June* 18, 1904.

EDWARD H. FALLOWS, Esq., 170 Broadway, New York City.

DEAR SIR: In the Matter of the Transfer Tax upon the estate of Joseph Stickney, deceased December 21, 1903, I submit herewith my supplement to the original report dated June 15, 1904.

The Executors make claims for the following reductions

A. On 166 Bonds Lytle Coal Co. from Par to 75.....	$41,500.00
B. On 2000 shares Common Mt. Pleasant Hotel Co. from Par to 25 Bretton Woods N. H.....	150,000.00
C. On 1000 Shares Preferred, said Co. from Par to 30...	70,000.00
D. On Note of Lytle Coal Co. for $246,000 from Par to 50.....	123,000.00
Total.....	$384,500.00

A. This Company was organized under the laws of Pennsylvania, controlling and operating Coal Lands owned by the Deceased's Firm. It was not organized by the deceased. The Firm was, however, induced to assist such Company during the many years of its financial depression, and this resulted in the gradual acquirement of shares as noted in Schedule #2 Lots #15 and 16. The cost at par being $440,000. was reduced on the Ledger to $4,101 by direct authority of the deceased, which distinctly and clearly expresses his judgment; and none knew better. Under these circumstances I regard the Market Value of this Company's Bond at 75 very satisfactory.

B. In respect of this Company, the organization was effected years ago by the deceased. Its purpose seems clear and the deceased
83 being a native of New Hampshire constantly gave expression of his activity and sentiment regarding this enterprise. By sheer force of his personality, no more and no less, his conclusion took shape prior to 1902 to make vast improvements to this Hotel Property, and this he effected against the judgment of his best friends and that of his Survivor Partner. The opening of this property I am informed by one of the Executors occurred July 15, 1902 and presented a perfect ensemble of Hotel Equipment. Now the prevailing question is "What are these shares worth?" judged either by the Market value or value from the standpoint of a pursuit for profit, or any standard or value of whatever form. With the dissappearance of the deceased's activities in the details of the management, the Good Will loses substantially its value. The capital was increased to $1.500.000 composed of 10,000 shares Common and 5,000 shares Preferred and entirely issued at par to the deceased and his Firm. The Executors also informed me that the Survivor Partner expressed a willingness to sell his one half of said shares as noted under the heading of "Market Value" Schedule #2, to wit:

Common.....	$25 per share;
Preferred.....	30 " "

The Preferred has no preference as to Capital and hence only as to earnings that may be made in the future. This property has not been leased out for Season 1904. It is to be operated by the Executors with the consent of the Executrix.

"I recommend the acceptance of the above prices."

C. The explanation of "A" I believe contains also a satisfactory reason for allowing by you a reduction of 50% on the Lytle Coal Co.

Final Results.

Ledger value of Interest	$2,631,595.04
Less 50% from Total Deductions	192,250.00
Remainder Balance	2,439,345.04

Yours truly, SYDNEY P. WARD.

84 COMPTROLLER'S EXHIBIT No. 1, JULY 12, 1904.

Senate No. 354.

CHAP. 41.

An Act to Amend the Tax Law Relating to Exceptions and Limitations in the Taxation of Taxable Transfers.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section two hundred and twenty one of chapter nine hundred and eight of the laws of eighteen hundred and ninety-six, entitled "An Act in relation to taxation, constituting chapter twenty four of the general laws" as amended by chapter eighty eight of the laws of eighteen hundred and ninety eight, and chapter four hundred and fifty eight of the laws of nineteen hundred and one, is hereby amended to read as follows:

§ 221. Exceptions and limitations.—When property real or personal or any beneficial interest therein, of the value of less than ten thousand dollars, passes by any such transfer to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of a son or the husband of a daughter, or any child or children adopted as such in conformity with the laws of this state, of the decedent, grantor, donor or vendor, or to any child to whom any such decedent, grantor, donor or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided however, such relationship began at or before the child's fifteenth birthday and was continuous for said ten years thereafter, or to any lineal descendent of such decedent, grantor, donor or vendor born in lawful wedlock, such transfer of property shall not be taxable under this act; if real or personal property or any beneficial interest therein so transferred is of the value
85 of ten thousand dollars or more, it shall be taxable under this act at the rate of one per centum upon the clear market value of such property. But any property heretofore or hereafter devised or bequeathed to any person who is a bishop or to any religious corporation including corporations organized exclusively for bible or tract purposes shall be exempted from and not subject to the provisions of this act. There shall also be exempted from and not subject to the provisions of this act personal property other than money or securities bequeathed to a cor-

poration or association organized exclusively for the moral or mental improvement of men or women or for charitable, benevolent, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, cemetery or historical purposes or for the enforcement of laws relating to children or animals or for two or more of such purposes and used exclusively for carrying out one or more of such purposes, but no such corporation or association shall be entitled to such exemption if any officer, member or employé thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof except reasonable compensation for services in effecting one or more of such purposes or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purpose be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association or for any of its members or employés or if it be not in good faith organized or conducted exclusively for one or more of such purposes.

§ 2. This act shall take effect immediately.

Approved.

B. B. ODELL, Jr.

M'ch 16th, 1903.

86 STATE OF NEW YORK, *Feb. 26th*, 1903.

In Senate.

This Bill was duly passed, a majority of all the Senators elected voting in favor thereof.

By order of the Senate,

FRANK W. HIGGINS, *President.*

STATE OF NEW YORK, *March 11th*, 1903.

In Assembly.

This Bill was duly passed, a majority of all the members elected to the Assembly voting in favor thereof.

By order of the Assembly,

S. F. NIXON, *Speaker.*

STATE OF NEW YORK,
OFFICE OF THE SECRETARY OF STATE.

I hereby certify that this Act was filed in the Office of the Secretary of State on the 16 day of March, 1903.

JOHN F. O'BRIEN,
Secretary of State.

STATE OF NEW YORK, *March 11th*, 1903.

In Assembly.

This Bill was duly passed, a majority of all the members elected to the Assembly voting in favor thereof, three fifths being present.

By order of the Assembly,

S. F. NIXON, *Speaker.*

87 STATE OF NEW YORK, *Feb. 26th*, 1903.

In Senate.

This Bill was duly passed, a majority of all the Senators elected voting in favor thereof, three fifths being present.

By order of the Senate,

FRANK W. HIGGINS, *President.*

STATE OF NEW YORK.

In Senate.

STATE OF NEW YORK, *County of Cattaraugus, ss:*

Frank W. Higgins, being duly sworn, deposes and says: that in November 1902, he was duly elected Lieutenant Governor of the State of New York, and thereby became the President of the State Senate.

That on Thursday, February 26th 1903, he presided over the Senate when there came up for consideration on the order of third reading Senate Bill No. 354, entitled "An Act to amend the tax law, relating to exceptions and limitations in the taxation of taxable transfers."

That on said day said bill was duly passed, three fifths of all the Senators elected being present and became a law with the approval of the Governor on March 16th, 1903, and is known as Chapter 41 of the Laws of 1903.

That thereafter, deponent, as such presiding officer, duly certified to the passage of said bill and the same with his certificate was filed in the office of the Secretary of State.

That deponent has now examined his said certificate attached to said bill as so filed in the office of the Secretary of State, and finds the same to be defective in that it does not state that three fifths of all the Senators elected were present. That he has per-

88 sonally examined the original Senate Journal of Thursday, February 26th, 1903, and the following is a true extract therefrom, showing that three fifths of all the Senators elected were present on the final passage of said bill; "The bill (No. 354) entitled "An Act to amend the Tax Law, relating to exceptions and limitations in the taxation of taxable transfers" (Int. No. 313) was read the third time.

The President put the question whether the Senate would agree to the final passage of said bill, the same having been printed and upon the desks of the members in its final form for three calendar legislative days, and it was decided in the affirmative, a majority of all the Senators elected voting in favor thereof, and three fifths being present, as follows:

For the Affirmative.

Allds	Fancher	McCabe
Armstrong	Gates	McCarren
Barnes	Goodsell	McEwan
Brackett	Breen	Prime
Brown, E. R.	Hill	Raines
Brown, W. L.	Lefevre	Sherwood
Davis	Lewis	Stevens
Dooling	L'Hommedieu	Stewart
Dowling	Malby	Warnick
Elsberg	Marshall	Wilcox

Ordered That the Clerk deliver said bills to the Assembly, and request their concurrence therein."

That deponent has signed, and attached hereto, a corrected amended certificate, showing that, on February 26th, 1903, Senate Bill No. 354, was duly passed, a majority of all the Senators elected voting in favor thereof, three fifths being present. That deponent makes this affidavit with the amended certificate hereto annexed, in order that they may be filed in the Office of the Secretary
89 of State with the said original Senate Bill No. 354 now Chapter 41 of the Laws of 1903.

FRANK W. HIGGINS. [SEAL.]

Sworn to before me this 25th day of June, 1904.

ALLAN B. WILLIAMS,
[L. S.] *Notary Public, Cattaraugus County.*

STATE OF NEW YORK, *County of Cattaraugus, ss:*

I, E. E. Kelley, Clerk of the County of Cattaraugus, and Clerk of the Supreme Court for said County the same being a Court of Record, Do hereby certify that Allan B. Williams whose name is subscribed to the Jurat of the annexed affidavit, and thereupon written, was at the time of taking such affidavit, a Notary Public in and for the County of Cattaraugus, dwelling in said County, Commissioned and sworn, and duly authorized to take the same. And further that I am well acquainted with the handwriting of said officer, and verily believe that the signature to the said jurat is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court and County, at Little Valley, the 26th day of June 1904.

[L. S.] E. E. KELLEY, *Clerk.*

STATE OF NEW YORK.

In Assembly.

STATE OF NEW YORK, *County of Albany, ss:*

S. Fred Nixon, being duly sworn, deposes and says that he was duly elected Speaker of the Assembly of the State of New York for the session of the year 1903.

That on Wednesday, March 11th, 1903, he presided over the Assembly when there came up for consideration on the order of
90 third reading Senate Bill No. 354 (Rec. No. 95) entitled "An Act to amend the tax law relating to exceptions and limitations in the taxation of taxable transfers."

That on said day said Bill was duly passed, three fifths of all the members elected to the Assembly being present, and became a law, with the approval of the Governor, on March 16th 1903, and is known as Chapter 41 of the Laws of 1903.

That thereafter deponent, as such presiding officer, duly certified to the passage of said bill and the same with his certificate was filed in the office of the Secretary of State.

That deponent has now examined his said certificate attached to said bill as so filed in the Office of the Secretary of State and finds the same to be defective in that it does not state that three-fifths of all the members elected to the Assembly were present. That deponent has personally examined the original Assembly Journal of Wednesday March eleventh, 1903 and that the following is a true extract therefrom, showing that three-fifths of all the members elected were present on the final passage of said bill:

"Mr. Speaker announced the special order, being the Senate bill (No. 354) entitled "An Act to amend the Tax Law relating to exemptions and limitations in the taxation of taxable transfers." (Rec. No. 95.) * * *

On motion of Mr. Dickinson, said bill was placed on the order of third reading.

Said bill was then read the third time, having been printed and upon the desks of the members in its final form at least three calendar legislative days prior to its final passage.

Mr. Speaker put the question whether the House would agree to the final passage of said bill, and it was determined in the affirmative, a majority of all the members elected to the Assembly voting in favor thereof, and three-fifths being present.

Ayes, 82
Noes, 53

91 Those who voted in the affirmative were:

Agnew	Graeff	Phillips
Allen	Grattan	Plank
Allston	Hammond	Platt
Apgar	Hanford	Remsen
Bedell	Harvey	Reynolds
Bostwick	Hayden	Robinson
Bridgeman	Hewitt	Rogers
Brill	Hoadley	Ruehl
Burnett	Hooker	Scovill
Cadin	Hubbs	Sheldon
Chambers	Hughes	Simpson
Clark	Knapp	Smith, A. P.
Conkling, H.	Landon	Smith, C. W.
Conkling, J. B.	Leggett	Smith, G. H.
Cook, E.	Lewis	Smith, J. T.
Coon	McNair	Stevens
Costello	Mead	Stiles
Cowan	Merritt	Thorn
Cox	Monroe	Truab
Davis, L. L.	Moran	Wainwright
Davis, M.	Moreland	Weber
Dennison	Morgan	Wemple
Dickinson	Nichols	Whitney
Doughty	Orr	Williams
Dowling	Outterson	Wood
Evans	Patchin	Yale
Finch	Patton	
Fowler	Pearsall	

92 Those who voted in the negative were:

Abrams	Everett	Metcalfe
Bourke	Farrell	Miller
Bradley	Fitzpatrick	Mortimer
Bullwinkel	Hackett	Mullaney
Burke	Hoffman	Neville
Burns	Hornidge	Pallace
Butler	Kearney	Palmer
Byrne	Keegan	Prince
Cohn	Kehoe	Richter
Cooke, W. V.	Litthauer	Rosenstein
Curry	Lynch	Shanahan
Dale	Mathews	Sherry
Daly	McCarthy, E. J.	Sloane
Dolan	McCormack	Sullivan
Doll	McCullough	Sulzburger
Dooling	McInerney	Ulrich
Doyle	McKeown	Zettler.
Ellis	McManus	

Ordered, That the Clerk return said bill to the Senate with a message that the Assembly have concurred in the passage of the same."

That deponent has signed and attached hereto a corrected, amended certificate showing that on March 11th, 1903, Senate bill No. 354 (Rec., No. 95) was duly passed a majority of all the members elected to Assembly voting in favor thereof, three-fifths being present.

That deponent makes this affidavit, with the amended certificate hereto annexed in order that they may be filed in the office of the Secretary of State with the said original Senate bill No. 354 now Chapter 41 of Laws of 1903.

S. FRED NIXON.

Sworn to before me this 30th day of June, 1904.

GEO. C. LEWIS,
Notary Public, Albany County.

93 STATE OF NEW YORK, *Office of the Secretary of State, ss:*

I hereby certify that this amended jurat and the affidavits of Frank W. Higgins and S. Fred Nixon sworn to respectively upon the 25" and 30" days of June, 1904, were filed in the office of the Secretary of State, and attached to Chapter 41 original Laws of 1903, on file in this office upon the 30" day of June, 1904.

J. B. H. MONGIN,
Deputy Secretary of State.

STATE OF NEW YORK, *Office of the Secretary of State, ss:*

I have compared the preceding copy of Chapter 41 Laws of 1903, and the preceding copies of the original and amended certificates and the affidavits of the presiding officers of the Senate and Assembly of 1903, attached thereto, and also the certificate of the Deputy Secretary of State, with the originals thereof on file in this office, and do hereby certify that the same are correct transcripts therefrom and the whole thereof.

Given under my hand and the seal of office of the Secretary of State, at the City of Albany, this thirtieth day of June, in the year one thousand nine hundred and four.

J. B. H. MONGIN,
[L. S.] *Deputy Secretary of State.*

94 COMPTROLLER'S EXHIBIT 2, 7–12–'04.

Extract from Senate Journal of Thursday, February 26th, 1903, Page 305.

"The bill (No. 354) entitled "An Act to amend the Tax Law relating to exceptions and limitations in the taxation of taxable transfers" (Int. No. 313) was read the third time.

The president put the question whether the Senate would agree to the final passage of said bill, the same having been printed and upon the desks of the members in its final form for three calendar legislative days, and it was decided in the affirmative, a majority of all the Senators elected voting in favor thereof, and three-fifths being present, as follows:

For the Affirmative.

Allds	Fancher	McCabe
Armstrong	Gates	McCarren
Barnes	Goodsell	McEwan
Brackett	Green	Prime
Brown, E. R.	Hill	Raines
Brown, W. L.	Lefevre	Sherwood
Davis	Lewis	Stevens
Dooling	L'Hommedieu	Stewart
Dowling	Malby	Warnick
Elsberg	Marshall	Wilcox

Ordered That the Clerk deliver said bill to the Assembly and request their concurrence therein."

STATE OF NEW YORK.

In Senate.

STATE OF NEW YORK, *County of Cattaraugus, ss:*

I, James Whipple, Clerk of the Senate of the State of New York, do hereby certify that I have carefully compared the foregoing extract from the Senate Journal of February 26th, 1903, Page 305, with the original Senate Journal now on file in my office, and that the same is a correct and true copy thereof.

95

In witness whereof, I have set my hand and official seal this 1" day of July, 1904.

JAMES S. WHIPPLE, [L. S.]
Clerk of the Senate.

Sworn to before me this 1st day of July, 1904.
GEO. B. SPENCER,
Notary Public, Cattaraugus County.

COMPTROLLER'S EXHIBIT No. 3, JULY 12, 1904.

Extract from Assembly Journal of Wednesday, March 11th, 1903, Pages 902 to 911, Inclusive.

"Mr. Speaker announced the special order, being the Senate bill (No. 354) entitled "An act to amend the Tax Law, relating to exemptions and limitations in the taxation of taxable transfers" (Rec. No. 95). * * *

On motion of Mr. Dickinson, said bill was placed on the order of third reading.

Said bill was then read the third time, having been printed and upon the desks of the members in its final form at least three calendar legislative days prior to its final passage.

Mr. Speaker put the question whether the House would agree to the final passage of said bill, and it was determined in the affirmative, a majority of all the members elected to the Assembly voting in favor thereof, and three fifths being present.

Ayes, 82.

Noes, 53.

96 Those who voted in the affirmative were:

Agnew	Graeff	Phillips
Allen	Gratton	Plank
Allston	Hammond	Platt
Apgar	Hanford	Remsen
Bedell	Harvey	Reynolds
Bostwick	Hayden	Robinson
Bridgeman	Hewitt	Rogers
Brill	Hoadley	Ruehl
Burnett	Hooker	Scovill
Cadin	Hubbs	Sheldon
Chambers	Hughes	Simpson
Clark	Knapp	Smith, A. P.
Conkling, H.	Landon	Smith, C. W.
Conkling, J. B.	Leggett	Smith, G. H.
Cook, E.	Lewis	Smith, J. T.
Coon	McNair	Stevens
Costello	Mead	Stiles
Cowan	Merritt	Thorn
Cox	Monroe	Traub
Davis, L. L.	Moran	Wainwright
Davis, M.	Moreland	Weber
Denison	Morgan	Wemple
Dickinson	Nichols	Whitney
Doughty	Orr	Williams
Dowling	Outterson	Wood
Evans	Patchin	Yale
Finch	Patton	
Fowler	Pearsall	

97 Those who voted in the negative were:

Abrams	Cohn	Doyle
Bourke	Cooke, W. V.	Ellis
Bradley	Curry	Everett
Bullwinkel	Dale	Farrell
Burke	Daly	Fitzpatrick
Burns	Dolan	Hackett
Butler	Doll	Hoffman
Byrne	Dooling	Hornidge

Kearney	McKeown	Richter
Keegan	McManus	Rosenstein
Kehoe	Metcalfe	Shanahan
Litthauer	Miller	Sherry
Lynch	Mortimer	Sloane
Mathews	Mullaney	Sullivan
McCarthy, E. J.	Neville	Sulzburger
McCormack	Pallace	Ulrich
McCullough	Palmer	Zettler
McInerney	Prince	

Ordered That the Clerk return said bill to the Senate, with a message that the Assembly have concurred in the passage of the same."

STATE OF NEW YORK.

In Assembly.

STATE OF NEW YORK, *County of Chemung, ss:*

I, Archie E. Baxter, Clerk of the Assembly of the State of New York, do hereby certify that I have carefully compared the foregoing extract from the Assembly Journal of March 11th, 1903, Pages 902 to 911, inclusive, with the original Assembly Journal now on file in my office, and that the same is a correct and true copy thereof.

98 In Witness Whereof I have set my hand and official seal this 30th day of June 1904.

A. E. BAXTER,
Clerk of the Assembly. [L. S.]

Sworn to before me this 30th day of June 1904.
THOMAS F. FENNELL,
Notary Public, Chemung Co., N. Y.

COMPTROLLER'S EXHIBIT 4.

Surrogate's Court, County of New York.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

STATE OF NEW YORK, *County of New York, ss:*

Alfred E. Marling, being duly sworn, deposes and says that he is a member of the firm of Horace S. Ely & Company, doing business as real estate appraisers and brokers at No. 22 Liberty Street, Borough of Manhattan New York City. That he has been engaged in the business of appraising the values of real estate in the Boroughs of Manhattan and the Bronx for more than twenty years past. That he is familiar with the values of real estate in the Boroughs

of Manhattan and the Bronx in the City of New York, in-
99 cluding the values of real estate located in the neighborhood of the premises hereinafter mentioned.

That at the request of Edward H. Fellows, Attorney for the Comptroller of the State of New York, he has had examined the following property, and in his opinion the fair market value of said property, as of the date of said decedent's death on the 21st day of December, 1903, was as follows:

Plot of land located at the southwesterly corner of Eastchester Road and Boston Post Road, in the Borough of the Bronx, and distinguished on the map of the Commissioners of Taxes and Assessments of the City of New York as lot No. 2, in Plot No. 4, Volume 12, Ward 24, in the Borough of the Bronx, containing about 50 acres..... $150,000

Using $3,000 per acre as the unit of value.

Plot of land on the Southwesterly side of Corsa Ave. (or Eastchester Road) near 5th St., Wakefield and distinguished on the Map of the Commissioners of Taxes and Assessments of the City of New York as Lot No. 1, Plot No. 2, Volume 10, Ward 24, Borough of the Bronx containing about 51.884 acres..... 181,594

Using as the unit of value $3500 per acre.

ALFRED E. MARLING.

Sworn to before me this 5th day of July, 1904.

C. L. ADAMS,
Notary Public, Kings Co., N. Y.

Certificate filed in N. Y. Co.

100 COMPTROLLER'S EXHIBIT 5.

Surrogate's Court, County of New York.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

STATE OF NEW YORK, *County of New York*, ss:

Alfred E. Marling, being duly sworn, deposes and *and* says that he is Vice-President and Treasurer of the Corporation of Horace S. Ely & Company, doing business as real estate appraisers and brokers at No. 21 Liberty Street, Borough of Manhattan, New York City. That he has been engaged in the business of appraising the values of real estate in the Boroughs of Manhattan and the Bronx for more than Twenty Years past. That he is familiar with the values of real estate in the Boroughs of Manhattan and the Bronx in the City of New York, including the values of real estate located in the neighborhood of the premises hereinafter mentioned.

That at the request of Mitchell & Mitchell, Attorneys, he has had

examined the following property, and in his opinion the fair market value of said property, as of the date of said decedent's death on the 21st day of Dec., 1903, was as follows:—

112 *West 56th Street*

Situate on the South Side of 56th Street, distant 200′ West of Sixth Avenue, the lot being size 25′ x 100′ 5″, on which there is a 2 story brick stable..... $35,000

874 *Fifth Avenue*

101 Situate on the East Side of Fifth Avenue, 55′ North of 68th Street, the lot having a frontage of 45′ by a depth of 125′ on the Northerly line and 175′ on the Southerly line, on which there is a 4 story and basement brick and stone dwelling..... 450,000

(S'd) ALFRED E. MARLING.

Sworn to before me this 9th day of June, 1904.

C. L. DAVIS,
Notary Public, Kings Co., N. Y.

Certificate filed in New York Co.

EXECUTOR'S EXHIBIT A, 7/12/04. L. A. Z.

CHAP. 41.

An Act to Amend the Tax Law Relating to Exceptions and Limitations in the Taxation of Taxable Transfers.

Became a law, March 16, 1903, with the approval of the Governor. Passed, a majority being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section two hundred and twenty-one of chapter nine hundred and eight of the laws of eighteen hundred and ninety-six, entitled "An Act in relation to taxation, constituting chapter twenty-four of the general laws," as amended by chapter eighty-eight of the laws of eighteen hundred and ninety-eight, and chapter four hundred and fifty-eight of the laws of nineteen hundred and one, is hereby amended to read as follows:

§ 221. *Exceptions and Limitations.*—When property real or personal or any beneficial interest therein, of the value of less than
102 ten thousand dollars, passes by any such transfer to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of a son or the husband of a daughter, or any child or children adopted as such in conformity with the laws of this state, of the decedent, grantor, donor or vendor, or to any child, to whom any such decedent, grantor, donor or vendor for not less than ten

years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday, and was continuous for said ten years thereafter, or to any lineal descendant of such decedent, grantor, donor or vendor born in lawful wedlock, such transfer of property shall not be taxable under this act; if real or personal property, or any beneficial interest therein, so transferred is of the value of ten thousand dollars or more, it shall be taxable under this act at the rate of one per centum upon the clear market value of such property. But any property heretofore or hereafter devised or bequeathed to any person who is a bishop or to any religious corporation including corporations organized exclusively for Bible or tract purposes shall be exempt from and not subject to the provisions of this act. There shall also be exempted from and not subject to the provisions of this act personal property other than money or securities bequeathed to a corporaton or association organized exclusively for the moral or mental improvement of men or women or for charitable, benevolent, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, cemetery or historical purposes or for the enforcement of laws relating to children or animals or for two or more of such purposes and used exclusively for carrying out one or more of such purposes. But no such corporation or association shall be entitled to such exemption if any officer, member, or employé thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof except reasonable compensation for services in effecting one or more of such
103 purposes or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purpose be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association or for any of its members or employés or if it be not in good faith organized or conducted exclusively for one or more of such purposes.

§ 2. This act shall take effect immediately.

STATE OF NEW YORK, *Feb.* 26, 1903.

In Senate.

This bill was duly passed, a majority of all the Senators elected voting in favor thereof.

By order of the Senate,

FRANK W. HIGGINS, *President.*

STATE OF NEW YORK, *March* 11, 1903.

In Assembly.

This bill was duly passed, a majority of all the members elected to the Assembly voting in favor thereof.

By order of the Assembly,

S. F. NIXON, *Speaker.*

STATE OF NEW YORK, *Office of the Secretary of State, ss:*

I have compared the preceding copy of Chapter 41 of the Laws of 1903 and ctfs. of presiding officers of Senate & Assembly *in re* thereto with the original law & ctfs. on file in this office, and do hereby certify that the same are correct transcripts therefrom and the whole thereof.

Given under my hand and the Seal of office of the Secretary of State, at the City of Albany, this 12th day of April in the year one thousand nine hundred and four.

(S'd) HORACE G. TENNANT,
[SEAL.] *2d Deputy Secretary of State.*

104 *Order Assessing Tax.*

At a Surrogate's Court, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 11th day of November, 1904.

Present: Hon. Frank T. Fitzgerald, Surrogate.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

On reading the report of James Yereance, the appraiser, filed herein on the 14th day of October, 1904, and on motion of Mitchell & Mitchell attorneys for the Executors herein, it is

Ordered and adjudged that the cash value of the property referred to in said report, the transfer of which is subject to the tax imposed by the Act relating to taxable transfers, and the tax to which the said transfers are liable is as follows:—

Beneficiary.	Cash value of interest.	Tax assessed thereon.
Carolyn Foster Stickney, Wife,		
Interest in estate	$3,068,629.30	
Of which	2,400,744.80	
is personal property;		$24,007.44
And of which	$667,884.50	
is real property.		6,678.85
105 Mary T. Stickney, no relation,		
Interest in estate	$5,000.00	250.
Ella T. Stickney, Niece,		
Interest in estate	100,000.00	5,000.
Harriet S. Jenks, Cousin,		
Interest in estate	10,000.00	500.
Rebecca L. Armington, Cousin,		
Interest in estate	10,000.00	500.
Olivia G. Moulton, Cousin,		
Interest in estate	10,000.00	500.
Charles S. Boardman, Cousin,		
Interest in estate	10,000.00	500.

Beneficiary.	Cash value of interest.	Tax assessed thereon.
Lucretia S. Waterman, Cousin, Interest in estate	$10,000.00	$500.
Charles F. Osgood, Cousin, Interest in estate	5,000.00	250.
Robert C. Osgood, Cousin, Interest in estate	1,000.00	50.
Mark J. Osgood, Cousin, Interest in estate	1,000.00	50.
Herbert S. Osgood, Cousin, Interest in estate	1,000.00	50.
Lillian A. Osgood, Cousin, Interest in estate	1,000.00	50.
Charles F. Osgood, Cousin, Interest in estate	1,000.00	50.
John G. Moran, Cousin, Interest in estate	10,000.00	500.
Albert C. Gibson, Cousin, Interest in estate	10,000.00	500.
B. Walker Peterson, Cousin, Interest in estate	10,000.00	500.
Mary F. Gibson, Cousin, Interest in estate	10,000.00	500.
106 Ruth A. Gibson, Cousin, Interest in estate	2,500.00	125.
Adelaide M. Gibson, Cousin, Interest in estate	2,500.00	125.
Mary T. Gibson, Cousin, Interest in estate	2,500.00	125.
Cora I. Gibson, Cousin, Interest in estate	2,500.00	125.
George B. Osgood, Cousin, Interest in estate	10,000.00	500.
Lucretia O. Bailey, Cousin, Interest in estate	10,000.00	500.
Mary L. J. Paige, Cousin, Interest in estate	10,000.00	500.
Allen M. Jenks, Cousin, Interest in estate	10,000.00	500.
Robert I. Jenks, Cousin, Interest in estate	100,000.00	5,000.
The Home for Friendless Children of Wilkesbarre, Pennsylvania, Interest in estate	5,000.00	250.
The Wilkesbarre City Hospital, Interest in estate	5,000.00	250.
The Centennial Home for the Aged of Concord, N. H., Interest in estate	5,000.00	250.

Beneficiary.	Cash value of interest.	Tax assessed thereon.
The Margaret Pillsbury General Hospital of Concord, N. H., Interest in estate.....	$5,000.00	$250.
The Charity Organization Society of the City of New York, Interest in estate.....	5,000.00	250.

FRANK T. FITZGERALD, *Surrogate.*

107 *Notice of Appeal to Surrogate.*

Surrogate's Court, County of New York.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

Notice of Appeal to the Surrogate from the Report of the Appraiser and the Order Entered Thereupon Fixing the Tax.

SIRS: *Please take notice*, that Carolyn Foster Stickney, as Executrix, and Robert I. Jenks and John G. Hannah, as Executors, of the Last Will and Testament of Joseph Stickney, deceased, and Carolyn Foster Stickney in her individual capacity and as widow and devisee of said decedent, feeling aggrieved by the appraiser's report and the order entered thereupon, and having objections thereto, hereby appeal to the Surrogates of the County of New York, or one of them, from the order and determination by a Surrogate of said County heretofore entered herein on the eleventh day of November, 1904, upon the report of the Appraiser in the above entitled matter, fixing the tax upon the real property of said decedent at $6,678.85, or any tax upon said real property, and that the grounds of such appeal are as follows:

I. The objections stated in the affidavit of Robert I. Jenks, verified on the ninth day of May, 1904, and presented to said Appraiser and reading as follows:

"In this matter deponent is advised by counsel and believes that "the decedent's real property in New York State devised to his "widow is not taxable under the Transfer Tax Laws of the State of
"New York; that under said laws prior to Chapter 41 of the
108 "Laws of 1903, hereinafter referred to, said decedent's real
"property so devised to his widow would not have been tax-"able; that a tax on such real property of said decedent so devised "is attempted to be imposed, continued or revived, or a debt or "charge thereon to be created, by virtue of the Act of the Legisla-"ture known as Chapter 41 of the Laws of 1903, entitled: 'An Act "'to amend the tax law relating to exceptions and limitations in "'the taxation of taxable transfers.' Said Act purports to impose, "continue or revive a tax, or create a debt or charge, and is uncon-

"stitutional, invalid and void for the reason that said Act was "'passed, a majority being present,' and that a quorum of three-"fifths of all the members elected to either House was not present "on the final passage of said Act, as will conclusively appear by the "certificates of the presiding officers of the two Houses of the Legis-"lature appended to said original Act, or by a duly certified copy of "said Act and of said certificates of the presiding officers of said two "Houses."

II. The executors' Exhibit A, being a certified copy made by the Secretary of State and dated April 12, 1904, of Chapter 41 of the Laws of 1903, and of the certificates of the President of the Senate and of the Speaker of the Assembly, which are appended to the original Act then on file in the Office of the Secretary of State, is conclusive evidence made so by positive statute law, that a majority only of the Senate and of the Assembly was present on the passage of the bill and not three-fifths. The certifications of the presiding officers of the Senate and of the Assembly and the certificate of the Secretary of State contained in said Exhibit read as follows:—

109 "STATE OF NEW YORK, *Feb.* 26, 1903.

"In Senate.

"This bill was duly passed, a majority of all the Senators elected "voting in favor thereof.

"By order of the Senate,

"FRANK W. HIGGINS, *President.*"

"STATE OF NEW YORK, *March* 11, 1903.

"In Assembly.

"This bill was duly passed, a majority of all the members elected "to the Assembly voting in favor thereof.

"By order of the Assembly,

"S. F. NIXON, *Speaker.*"

"STATE OF NEW YORK, *Office of the Secretary of State, ss:*

"I have compared the preceding copy of Chapter 41 of the Laws "of 1903 and ctfs. of presiding officers of Senate & Assembly *in re* "thereto with the original law & ctfs. on file in this office, and do "hereby certify that the same are correct transcripts therefrom and "the whole thereof.

"Given under my hand and the Seal of Office of the Secretary of "State, at the City of Albany, this 12th day of April in the year "one thousand nine hundred and four.

"(S'd) HORACE G. TENNANT.
"[SEAL.] *2nd Deputy Secretary of State.*"

Laws of 1892, Chapter 682, Section 40, as amended Laws of 1894, Chapter 53 :—

"Certificate of Presiding Officer.—Upon the passage of a
110 "bill or concurrent resolution by either house, the presiding
"officer thereof shall append to such bill or resolution, a cer-
"tificate of the date of its passage by the votes of a majority of all
"the members elected to such house or in the presence of three-fifths
"of such members, if such be the case, or by the votes of two-thirds
"of all the members elected to such house, as the case may be. No
"bills shall be deemed to have so passed unless certified by the pre-
"siding officer, which certificate to such effect shall be conclusive
"evidence thereof."

Chapter 41 of the Laws of 1903 became a law March 16, 1903, with the approval of the Governor and Section 2 provided as follows :—

"This act shall take effect immediately."

III. The so-called amended certificates and certified copies of the affidavits of each of the presiding officers of the Senate and Assembly (Comptroller's Exhibit I.), which were verified respectively by Frank W. Higgins on the twenty-fifth of June, 1904, and by S. Fred Nixon on the thirtieth day of June, 1904, were made after the death of Joseph Stickney, the decedent, which was on December 21, 1903, and after April 12, 1904, when the Secretary of State certified a copy of said Act and the certificates of the presiding officers and of the whole of them on April 12, 1904, and were first filed in the office of the Secretary of State on June 30, 1904. These amended certificates and certified copies of the affidavits are incompetent, irrelevant and immaterial, are mere *ex parte* statements, are not sanctioned by any principle of parliamentary law known to the common law, or recognized by any statute of this State, have no weight as evidence, and should not be considered by any Court in determining the question of whether this Act of 1903 was or was not a valid law under the Constitution of this State.

IV. The said alleged amended certificates are false certificates for the following reasons:

111 (*a*). The so-called amended certificate by Mr. Nixon is dated March 11, 1903, and it appears by the certificate of the Secretary of State dated April 12, 1904, that no such certificate was on file with the Secretary of State on April 12, 1904, and it may be assumed that said amended certificate although dated March 11, 1903, was not made until about the time Mr. Nixon verified the affidavit on June 30, 1904, on which date it was filed in the Secretary of State's Office.

Said alleged amended certificate is headed: "In Assembly," and purports to be signed: "By order of the Assembly. S. F. Nixon, Speaker," whereas the Assembly which voted on this bill, and the term of office of S. F. Nixon as Speaker, had expired on December 31, 1903, so that at the time said amended certificate was signed by said S. F. Nixon, the Assembly of 1903 was not in existence and Mr. Nixon was not its Speaker.

(*b*). The so-called amended certificate by Mr. Frank W. Higgins, President, is dated February 26, 1903, and it appears by the certifi-

cate of the Secretary of State dated April 12, 1904, that no such certificate was on file with the Secretary of State on April 12, 1904, and it may be assumed that said amended certificate although dated February 26, 1903, was not made until about the time Mr. Higgins verified the affidavit on June 25, 1904, and was not filed in the Secretary of State's office until June 30, 1904.

Said alleged amended certificate is headed: "In Senate," and purports to be signed: "By order of the Senate. Frank W. Higgins, President," whereas the Senate which voted on this bill and constituted a branch of the Legislature for the year 1903, and the term of office of Frank W. Higgins as President of such Senate, had expired on December 31, 1903, so that at the time, in June, 1904, that said amended certificate was signed by said Frank W. Higgins as President of the Senate of 1903, said Senate of 1903 (not being a continuing body), was not in existence and Mr. Higgins was not its President.

112 V. The Secretary of State, whose statutory duty under the law it is "*to preserve*" the records in his office, was not warranted in receiving said alleged amended certificates and affidavits of the presiding officers of the Senate and of the Assembly, or in placing the same on file in his office, or in attaching them to Chapter 41, original Laws of 1903, as it appears he did by his certificate dated the thirtieth day of June, 1904, and this enlargement of the records of his office is in effect a mutilation thereof which the Courts should not sanction.

VI. The Comptroller's Exhibit No. 2, purporting to be a certified copy of an extract from the Senate Journal of Thursday, February 26, 1903, and purporting to show that Chapter 41 of the Laws of 1903, was passed three-fifths of the members elected to the Senate being present, was not competent as evidence, nor will the Courts under the law resort to the same for the purpose either of impeaching or validating any law of the State of New York as the same appears on file in the Office of the Secretary of State. The counsel for the State Comptroller when asked if the same were a copy of the printed journal, replied that he could not tell, and when asked whether there is any manuscript journal, answered: "That I cannot tell you."

The reception in evidence of this Comptroller's Exhibit No. 2 was in direct conflict with the Legislative Law which makes the certificate of the presiding officer's conclusive evidence as to whether there was only a majority present or three-fifths.

VII. The Comptroller's Exhibit No. 3, purporting to be a certified copy from the Assembly Journal of Wednesday, March 11, 1903, on final passage of Chapter 41 of the Laws of 1903, to the effect that three-fifths of all the members elected to the Assembly were present on that occasion, was not competent as evidence, nor will the Courts under the law resort to the same for the purpose either of impeaching or validating any law of the State of New York as the same appears on file in the Office of the Secretary of State.

113 VIII. Under the terms of the Legislative Law (Laws of 1892, Chapter 682, Section 40, as amended *Laws of 1894*, Chapter 53), it is provided as follows:

"No bill shall be deemed to have passed" (*i. e.*, in the presence of three-fifths) "unless certified by the presiding officer, which certificate to such effect shall be conclusive evidence thereof."

The procurement by the Comptroller of these so-called amended certificates and affidavits and the filing of the same in the Office of the Secretary of State, and the attaching of the same to Chapter 41, original Laws of 1903 by the Secretary of State on June 30, 1904, is the strongest evidence that the construction given to this Legislative Law by the State authorities required the certificates in the amended form to be made before the bill could take effect as a valid law; and even if the Court should hold that Chapter 41 original Laws of 1903 could be validated by any such attachments, it is objected that the law would be valid only from and after the thirtieth day of June, 1904, when such amended certificates were filed and could not possibly operate under the Constitution of the State to validly impose a tax on the real estate of the decedent or of any one who had died prior to June 30, 1904.

Dated New York, November 16th, 1904.

Yours, &c.,

MITCHELL & MITCHELL,

Attorneys for Carolyn Foster Stickney and Others, Executors, and Carolyn Foster Stickney, Individually, and as Widow and Devisee of Joseph Stickney, Deceased.

Office and Post-office Address: Nos. 44 & 46 Wall Street, Borough of Manhattan, City of New York.

To James A. Donnelly, Esq., Clerk of the Surrogate's Court. Edward H. Fallows, Esq., By George M. Judd, Esq., Attorney for State Comptroller.

114 *Opinion of Mr. Surrogate Fitzgerald Affirming Order Assessing Transfer Tax.*

By FITZGERALD, *S.*:

Estate of Joseph Stickney—In 1903 the Legislature passed an act known as chapter 41 of the Session Laws of that year, the title of which reads as follows: "Chapter 41. An act to amend the Tax Law relating to exceptions and limitations in the taxation of taxable transfers. Became a law March 16, 1903, with the approval of the governor. Passed, a majority being present." The effect of the amendment was to render liable to taxation real property transferred to certain relatives, theretofore exempt. On December 21, 1903, the decedent died, leaving a will by which he devised certain real estate, of which he died seized, to his widow, one of the appellants herein. There is no dispute that the act referred to was one that, by express provision of the constitution, upon its final passage required

the presence of three-fifths of all members elected to either House to constitute a quorum (sec. 25, art. III, constitution). The Legislative Law (Laws of 1892, chap. 682, sec. 40, as amended, Laws of 1894, chap. 53) provides as follows: "Certificate of presiding officer. Upon the passage of a bill or concurrent resolution by either House, the presiding officer thereof shall append to such bill or resolution, a certificate of the date of its passage by the votes of a majority of all the members elected to such House, or in the presence of three-fifths of such members, if such be the case, or by the votes of two-thirds of all the members elected to such House, as the case may be. No bills shall be deemed to have so passed unless certified by the presiding officer, which certificate to such effect shall be conclusive evidence thereof." The Legislative Law further provides (sec. 44, as amended, Laws of 1892, chap. 53): "Statement in Session Laws as to Passage of Law. In the publication of every law, the Secretary of State shall omit the certificates appended thereto, but
115 shall cause to be inserted immediately under the title of the law, a statement to the effect that it became a law upon the properly specified date, with or without the approval of the governor, or notwithstanding his objections, as the case may be, and adding the words 'passed by a two-thirds vote,' 'passed, three-fifths being present,' or 'passed, a majority being present,' in accordance with the certificates appended to the original bill. Such statement shall be presumptive evidence that the original law was certified by the presiding officer of each House accordingly." The original certificates of the President of the Senate and of the Speaker of the Assembly, appended to the original act on file in the office of the Secretary of State read that this bill (chap. 41, Laws of 1903) was duly passed, a majority of all the members elected to the respective Houses voting in favor thereof. In June, 1904, certain amended certificates were made by the ex-president of the Senate of 1903, and the ex-speaker of the Assembly of that session, filed in the office of the Secretary of State and attached to the original act, which read that the bill was duly passed, a majority of all the members elected to the respective Houses voting in favor thereof, three-fifths being present, the addition of the last three words constituting the amendment. On the hearing before the appraiser the comptroller introduced in evidence extracts from the journals of the respective houses which establish that on the final passage of the bill the requisite three-fifths were present. The appellants claim that the original act and certificates are conclusive; that the amended certificates and affidavits filed therewith were inadmissible in evidence as incompetent, and that the amended certificates were appended to the original bill without authority of law; that when the amended certificates were made the bodies of which the persons certifying had been presiding officers had no existence and they were "*functus officio*." Their chief point, and that to which I will allude at length, is that neither the extracts from the journals nor the journals themselves are legitimate evidence; they were not "records" at common law, and have not
116 been made so by any statute; that courts should not resort to them for the purpose either of impeaching or of validating

any law, but should regard only the original engrossed bill on file in the office of the Secretary of State. Prior to 1892 the Revised Statutes (pt. 1, chap. 7, title 4) only provided for the certificates of the presiding officers in relation to two-thirds bills. Section 3 declared that "no bill shall be deemed to have been passed by the assent of two-thirds of the members elected to each house, unless so certified by the presiding officer of each house." The Legislative Law (chap. 682, Laws of 1892) directed that the presiding officers should append the certificates "upon the passage of the bill," and extended the requirement of such certificates to the three-fifths bills. In 1894 the law was amended so as to include majority bills. Before 1892 there was no provision of law making the certificate of the presiding officers conclusive evidence as to the manner in which bills were passed. This is an important fact to be kept in mind, as no decision by the courts of this State has been cited which arose under a law enacted subsequent to the Legislative Law. The cases relied upon by the comptroller were decided under the provisions of the Revised Statutes. That a court of first impression will not declare a statute unconstitutional unless manifestly so is the rule; almost invariably it will content itself with a *pro forma* decision sustaining the law attacked, relegating the controversy to the higher tribunals. In the present case, however, I do not think that I am confronted with a situation presenting a question as to the constitutionality of the Act of 1892, prescribing the conclusiveness as evidence of the certificate therein specified. The statement appended to the Session Laws relative to the law in question is only made presumptive evidence that the original law was certified by the proper officers in the manner stated. The statement obviously does not conform to the certificates of such officers to the original law, and whatever may be taken to be its meaning, or its intended effect, it is open to contradiction by proper proof. The certificates attached to the
117 original law, as far as they go, prove themselves, or, to that extent, are made conclusive by the Act of 1892 (chap. 482, as amended) on the assumption that it is a valid law, and so far as they omit to state the fact as to the act having been passed in presence of three-fifths of the members elected to each house, the certificates were incomplete and defective, and there is nothing in the Act of 1892 last mentioned, in the view I take of it, incompatible with the right of the presentation of competent proof on the subject. The journals which have been received in evidence I consider such proof, and they prove that the requisite quorum was present on the final passage of the act in question, and this evidence supersedes the incomplete and defective certificates of the presiding officers. The decision of the United States Supreme Court (Field *v.* Clark, 143 U. S. R., 649) I do not regard as in point. In that case it was claimed that a clause had been omitted from the engrossed bill, which the journals of both the Senate and the House of Representatives showed was included in the bill as passed. There is no provision of law requiring the journals to show the contents and provisions of measures, but there is an express command in the constitution of this State that the vote by which bills are passed shall be

recorded in the journals, and that direction is contained in the identical section requiring that certain acts shall only be passed with a specified quorum. Article 3, Section 25, of the constitution, provides as follows: "On the final passage in either house of the Legislature of any act which imposes, continues or revives a tax * * * the question shall be taken by yeas and nays, which shall be duly entered upon the journals, and three-fifths of all the members elected to either house shall, in all such cases, be necessary to constitute a quorum therein." Similar provision is made with reference to this subject in other parts of the constitution. Thus, article 3, section 15: "Nor shall any bill be passed or become a law except by the assent of a majority of the members elected to each branch of the Legislature; and upon the last reading of
118 a bill * * * the question upon its final passage shall be taken immediately, and the yeas and nays entered on the journal." Section 20 of the same article, which refers to two-thirds bills of a certain character, is the only exception where the direction to record the yeas and nays is not specifically directed. Article 4, section 9, provides that "in all such cases (where bills have been vetoed by the governor and have been repassed by a two-thirds vote), the votes in both houses shall be determined by the yeas and nays, and the names of the members voting shall be entered on the journal of each house respectively." Article 5, section 11, referring to the removal of judges, directs that "on the final question of removal the yeas and nays shall be taken and entered in the journal." Article 7, section 4, referring to the limitation of legislative power to create debts: "On the final passage of such a bill in either house of the Legislature, the question shall be taken by the ayes and noes, to be duly entered on the journal thereof." Referring to provisions of this description, Judge Cooley in his work on Constitutional Limitations (7th ed. p. 291), says: "It is also provided in the constitutions of some of the States that, on the final passage of every bill, the yeas and nays shall be entered on the journal. Such a provision is designed to serve an important purpose * * * in furnishing definite and conclusive evidence whether the bill has been passed by the requisite majority or not. The constitution prescribes this as the test by which to determine whether the requisite number of members vote in the affirmative. The office of the journal is to record the proceedings of the house and authenticate and preserve the same. It must appear on the face of the journal that the bill passed by a constitutional majority. These directions are all clearly imperative. They are expressly enjoined by the fundamental law as matters of substance, and cannot be dispensed with by the Legislature." The certificate attached to the Session Laws is that the bill was passed, "a majority being present," the words quoted being the literal words employed in section 44 of the Legislative Law. This state-
119 ment is made presumptive evidence that the presiding officers have appended to the original bill a certificate accordingly. By referring to the latter certificate we find that they have not so certified, but have certified in the language of section 40 of the Legislative Law that a majority of all the members elected to either

house voted in favor thereof. Thus we see that so far as majority bills are concerned, that is to say, all bills other than two-third bills, it is extremely doubtful whether the statement in the Session Laws can in any case be even presumptive evidence of the fact if it is intended to establish *prima facie*, viz: that the constitutional requirement (art. 3, sec. 15) was complied with, and the bill was passed by the assent of a majority of the members elected. The manifest purpose of section 40 and section 44 of the Legislative Law was to provide a convenient means of showing that, in the passage of a bill, the constitutional requirements were fulfilled. It was certainly not intended to furnish a ready method of destroying its safeguards. Article 3, section 15, directs that all bills must receive the assent of a majority of the members elected to each branch of the Legislature, and section 25 of the same article requires that on the final passage of any act imposing a tax three-fifths of all the members elected to either house shall be necessary to constitute a quorum. The certificate of the presiding officers, under a construction of section 40 of the Legislative Law, which keeps in view the sole purpose of its being, must show both these vital facts or it is defective. If the certificate were "passed three-fifths being present," and lacked the statement that a majority assented to its passage, it would, nevertheless, be defective. Three-fifths might be present, and yet a majority not vote in favor of the measure; yet the construction of this statute sought by the appellants would enable a presiding officer to certify truthfully that three-fifths were present, and that certificate could not be gainsaid. That, under these circumstances, recourse may be had to the journals to ascertain if the act was passed constitutionally, is sustained by authority. In The People, &c., *v.* Supervisors Chenango (8 N. Y., 317) the court held that the act was not a tax law, and did not call for the presence of three-fifths of the members elected. However, at page 329, Judge Willard says: "Although the Act of May 12, 1847, page 276, directs the presiding officers of each house, when a bill requires for its passage a quorum of three-fifths of all the members elected to each house to be present on the final passage thereof, to certify to such facts, yet it makes the certificate only presumptive evidence of the fact contained in it. Hence a bill certified to be passed when the requisite quorum was present may be shown under proper pleadings to have been passed when three-fifths were not present. On the same principle, if the proper officers have failed to give the certificate, the fact that three-fifths were present when it was passed may be shown from the journals or other evidence of an equally satisfactory character. The Act of 1847 does not make the certificate or the want of one conclusive, but only presumptive, evidence." The certificate in that case was as follows: "A majority of all the members elected to the Senate and Assembly voting therefor, and two-thirds of all members present concurring." The court further said, on page 329: "It is not competent for the Legislature to make the failure of its officers to append the proper certificate defeat the provisions of the constitution. Such would be the effect of the act if the want of a certificate was made conclusive evidence that three-fifths were not present when the final vote

was taken. The constitution has clothed the Legislature with no such power. And in the present instance they have not arrogated to themselves any such power." In Rumsey *v.* N. Y. & N. E. R. R. (130 N. Y., 88) the certificate of the presiding officer of the Senate was proper and showed the passage of the act by the assent of the requisite two-thirds. The speaker's certificate, however, only showed the presence of the two-thirds. The act as published in the Session Laws stated that it passed by a two-thirds vote. This latter statement makes it presumptively proven that the bill was certified
121 by the presiding officers as having passed by the assent of two-thirds of the members elected to each House. The court, referring to the presumption and the effect of the defective certificate of the speaker, said: "This presumption, however, may doubtless be overcome by the production of the original certificate. The certificate produced, however, does not state that it was not passed by a two-thirds vote. It merely states that it was passed; that the two-thirds of the members elected to the Assembly were present. The certificate, therefore, independent of the statutes referred to, would not overcome the presumption created by the statement appearing in the Session Laws. Under the statute the act shall not be deemed to have passed by the assent of two-thirds, unless the presiding officer so certifies, but this statute evidently contemplates that the certificate be made in due form, free from defects and clerical errors. Such a certificate would doubtless be conclusive; but to hold that a defective certificate, one that fails to state the fact either way, is, under the statute, conclusive, and overcomes the presumption created by the statement appearing in the Session Laws, is giving the statute an interpretation which we think was never intended." The court concluded that, as the certificate of the speaker was not in proper form, and omitted to state whether the bill was passed by a majority or two-thirds vote, it might look back to the journals to discover the fact. In the Matter of N. Y. & L. I. Bridge Co. (148 N. Y., 540, 555) it was claimed that chapter 411 of the Laws of 1892 was obnoxious to section 20 of article 3 of the constitution, which requires the assent of two-thirds of the members elected to each branch. The certificate in the Session Laws states that the bill "passed, three-fifths being present," and the certificates of the presiding officers of the Senate and of the Assembly attached to the original bill on file in the office of the Secretary of State also show that only three-fifths were present both in the Senate and in the Assembly. On the trial the journal of each House was received under objection, and the competency of such evidence was challenged. In the opinion at the Ap-
122 pellate Division Justice O'Brien, after stating the point and analyzing the decision in Rumsey *v.* N. Y. & N. E. R. R. (*supra*) at page 324, says: "If it is competent for the Legislature to enact a rule of evidence, it has seemingly prescribed one by section 40, by which the inquiry into the number of votes cast for any bill must be conducted, as declared, by resort to only one source of information, namely, the original act and certificates or the printed statute book when accompanied by the proper statement. Undoubtedly, where there is a defect in form, clerical error or irregu-

larity, it leaves the matter open to inquiry; and in the case of a defective certificate it would seem but reasonable to permit a resort to the journals of either house for the purpose of determining the vote by which a bill was passed. Were we called upon to determine the question here, where no defect, irregularity or error is shown in the statement in the Session Laws or the certificates of the presiding officers, we should be inclined to adopt the view contended for by the appellant. But it is unnecessary for us to decide it, and, therefore, with this intimation, we leave it until it is directly presented." The Court of Appeals (p. 555), after stating the character of the certificates, say: "We think the journals of the Senate and Assembly were properly received in evidence, and they show conclusively that the Act of 1892 received a two-thirds vote. * * * the journals were offered in evidence not for the purpose of contradicting the certificates, but to supplement them, as they were defective. We think it would defeat the provisions of the constitution and the statute if in such an emergency as was here presented recourse could not be had to the journals of the two houses (People *ex rel.* Supervisors, 8 N. Y., 317; Darlington *v.* Mayor, &c., 2 Robt., 277, aff'd 31 N. Y., 164; Rumsey *v.* N. Y. & N. E. R. R., 130 N. Y., 88)." While this decision is strictly dictum, yet it is the formal expression of the opinion of our highest tribunal, made after elaborate argument. I am of opinion that the amended certificate and affidavits of the presiding officers were incompetent evidence. The order is affirmed.

123 *Order of Surrogate, Affirming Order Assessing Tax, Being Order Appealed From.*

At a Surrogates' Court held in and for the County of New York, at the County Court House in the City of New York on the 7th day of July, 1905.

Present: Hon. Frank T. Fitzgerald, Surrogate.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

An appeal having been taken to the Surrogates' Court of New York County by Carolyn Foster Stickney as executrix and Robert I. Jenks and John G. Hannah as executors of the last will and testament of Joseph Stickney, deceased, and Carolyn Foster Stickney in her individual capacity and as widow and devisee of said decedent from an order of Hon. Frank T. Fitzgerald, one of the Surrogates of the County of New York, made and entered herein on the 11th day of November, 1904, in so far as said order fixes a tax upon the real property of said decedent, upon the ground that chapter 41 of the Laws of 1903, providing for the taxation of real property, is unconstitutional and void for the reasons set forth in appellants' notice of appeal to the Surrogate herein dated November 16th, 1904.

And the said appeal having thereafter come on to be heard before this Court, after hearing Messrs. Edward Mitchell, of counsel for the

appellants, and George M. Judd, of counsel for the respondent, and due deliberation having been had:

124 Now, on motion of Edward H. Fallows, attorney for the State Comptroller, respondent, it is

Ordered and adjudged that the order appealed from be and the same hereby is in all respects affirmed.

FRANK T. FITZGERALD, *Surrogate.*

Notice of Appeal to Appellate Division.

Surrogate's Court, County of New York.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

CAROLYN FOSTER STICKNEY, as Executrix, and ROBERT I. JENKS and JOHN G. HANNAH, as Executors of the Last Will and Testament of Joseph Stickney, Deceased, and CAROLYN FOSTER STICKNEY, in Her Individual Capacity and as Widow and Devisee, Appellants.

SIRS: Please take notice that Carolyn Foster Stickney as Executrix, and Robert I. Jenks and John G. Hannah, as Executors of the Last Will and Testament of Joseph Stickney, deceased, and Carolyn Foster Stickney, in her individual capacity and as widow and devisee of said Joseph Stickney, deceased, appeal to the Appellate Division of the Supreme Court of the First Department from the order made herein at a Surrogate's Court

125 held in and for the County of New York, at the County Court House in the City of New York on the seventh day of July, 1905, by the Hon. Frank T. Fitzgerald, Surrogate, and entered in the office of the Clerk of the Surrogate's Court in said County July 7, 1905, and from each and every part thereof.

Dated New York, July 14, 1905.

Yours, &c., MITCHELL & MITCHELL,

Attorneys for Carolyn Foster Stickney and Others, Executors; and Carolyn Foster Stickney, Individually, and as Widow and Devisee of Joseph Stickney, Deceased.

To the Clerk of the Surrogate's Court of the County of New York, and Edward H. Fallows, Esq., Attorney for the Comptroller of the State of New York.

Waiver of Certification.

It is hereby stipulated that the foregoing printed papers are true copies of the order appealed from herein, the notice of appeal and all the papers used in the Court below, and of the whole thereof, and now on file in the office of the Clerk of the Surrogate's Court of the County of New York, and that pursuant to Section 2567 of the Code

of Civil Procedure certification of said papers is hereby waived; and it is consented that the appeal be heard upon the foregoing record.

Dated New York, August 17, 1905.

MITCHELL & MITCHELL,
Attorneys for Appellant.
EDWARD H. FALLOWS,
Attorney for Comptroller of the State of New York, Respondent.

126 *Opinion of the Appellate Division.*

Supreme Court, Appellate Division, First Department, October, 1905.

Morgan J. O'Brien, P. J.
Edward Patterson,
George L. Ingraham,
Frank C. Laughlin,
John Proctor Clarke,
JJ.

No. 7838.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

Appeal by the executrix and executors and devisee of Joseph Stickney, deceased, from an order of the Surrogate's Court affirming an order of the Surrogate fixing a tax on the real property devised to the widow.

Mr. Edward Mitchell, for Appellant.
Mr. Geo. M. Judd, for Respondent.

LAUGHLIN, *J.*:

The tax purports to be authorized by chapter 41 of the laws of 1903 and it has been imposed pursuant to the provisions thereof. The question presented by the appeal is whether that statute can be given any force or effect as a tax measure; and since it has no
127 other effect the practical question is whether it ever became a law. There is no doubt that it was competent for the Legislature to enact the statute. The validity of the statute is questioned on constitutional grounds, but not for want of power on the part of the Legislature to enact it. It was a tax measure for it purported to impose a tax upon certain transfer of property by will and under the intestacy laws. The learned counsel for the appellant insists that it required a majority vote in each house in the presence of three-fifths of the members elected thereto as the constitutional quorum for such legislation (Art. III, § 25). The learned counsel for the Comptroller, however, draws attention to the fact that the preceding section 24 of Article III of the State Constitution which provides that "Every law

which imposes continues or revives a tax shall distinctly state the tax and the object of the tax to which it is applied, and it shall not be sufficient to refer to any other law to fix such tax or object," has been held inapplicable to the Transfer Tax, so called, and has been construed as applying only to the general taxes annually imposed (Matter of McPherson 104 N. Y., 306). The phraseology "which imposes continues or revives a tax" is the same in the succeeding section twenty-five which prescribes the vote and quorum. I think that the controlling point in that case was the difficulty of stating in every *special* tax law the purpose to which the tax is to be applied and especially in transfer tax legislation, so called, which was designed to operate continuously thus becoming a permanent tax measure. There is no difficulty in conforming with the requirements of said section 25 in the enactment of every tax law special as well as general; and consequently the reason that appears to have been controlling in Matter of McPherson does not exist for declaring it inapplicable to tax laws special in their nature as distinguished from the annual tax laws which, in addition to authorizing the annual tax levy contain an appropriation of the funds. I am, therefore, disinclined to regard that case as decisive of the question now under consideration. The so-called Collateral Inheritance or
128 Transfer Tax Law is a tax law pure and simple; and there being no insuperable obstacle to complying with the provisions of said section twenty-five in its enactment or in the enactment of amendments thereto, I see no reason for exempting such laws from its operation.

The precise claim of the appellant is that the constitutional three-fifths quorum was not present in either house when the amendment of 1903 was passed. This stand is not taken upon the *facts;* but it is contended that the condition of the statutory law with respect to the certification and publication of bills is such that upon the certificates originally attached to this bill, by the presiding officer of the Senate and Assembly respectively, a conclusive presumption arises that three-fifths of the members elected to each house was not present when the bill was passed. The bill, as printed in the Session Laws, shows after the title of the bill the following: "Became a law March 16, 1903, with the approval of the Governor. Passed, a majority being present." Section 44 of the Legislative Law, provides, among other things, that the Secretary of State in the publication of every law shall omit the certificate of the presiding officer of the respective houses attached thereto and shall add to the statute that it became a law on a specified date with or without the approval of the Governor or notwithstanding his objection, the words "passed by a two-thirds vote," "passed, three-fifths being present," or "passed, a majority being present," in accordance with the certificates appended to the original bill." This section further provides that "such statement shall be presumptive evidence that the original law was certified by the presiding officer of each house accordingly." It is of course competent for the Legislature to enact rules of evidence; and such is the statutory provision last quoted. The statute, therefore, as printed in the Session Laws only showed a majority present when it was passed

which, I think, would be insufficient. But inasmuch as the statement printed in the Session Laws is only presumptive evi-
129 dence as to what is shown by the certificates of the respective presiding officers appended to the original bill, recourse must next be had to the certificates themselves. The body of the original certificate appended to the original bill certified by the presiding officer of the Senate is as follows, "This bill was duly passed, a majority of all the members elected voting in favor thereof; and the original certificate of the presiding officer of the Assembly is in the same form, except that after the word "elected" the words "to the Assembly" appear in addition. On the 30th day of June, 1904, amended certificates made on the 25th day of June, 1904, by the presiding officer of the Senate for the year 1903 and by the presiding officer of the Assembly for 1903 on the 30th day of June, 1904, under date of the original certificates and in the same form but with the words "three-fifths being present" added thereto and accompanied by the affidavit of each of said presiding officers setting forth a transcript of the journal of the proceedings of each house on the passage of the bill, showing that the vote was taken and recorded by the yeas and nays and that more than three-fifths of the members elected to each house were present and more than a majority voted in favor thereof, —were filed with the Secretary of State and attached to the original bill. If the original certificates had been in the form of the amended certificates they would be sufficient and there would be no doubt as to the validity of the statute. It is claimed that the respective presiding officers became *functus officio* and that their certificates are nullities. The Assembly of course is not a continuous body. It expires with the Legislative year. Not so, however, with the Senate. Its official life is two years and the Senate for the years 1903 and 1904 was the same body. It organized at the outset for two years. Its committees and officers, including the presiding officer, remained the same and acted by the original authority throughout. The presiding officer of the Senate, therefore, was not *functus officio* on the theory that he had gone out of office. The pre-
130 siding officer of the Assembly happened to be the same for both years, but he was selected annually and acted each year by separate authority. In 1904, therefore, when he assumed to act for the Assembly of 1903, that body had expired and with it at the close of the year 1903 terminated his authority to represent it. The courts have at times by mandamus required officers and boards as bodies whose official terms had expired or their successors to perform an omitted ministerial duty of great public importance. In those cases, however, there is first an *adjudication as to the omitted duty and a judicial direction* as to what is to be performed. It should not be within the power of the presiding officer of the Senate or Assembly to nullify the will of the Legislature by omitting to append the requisite certificate to a bill or by appending one that is erroneous; but whether public policy required that this must be discovered and corrected before the bill goes to the Governor or to the Secretary of State or whether thereafter performance of the omitted duty may be compelled by the courts, need not now be decided. It was

contended in the court below that the amended certificates were valid and that they cured the defect. The learned counsel for the respondent appears to have abandoned that position on the appeal. With the evidence in the record, however, the question arises and must be decided for its decision will determine whether it is necessary to consider the other questions that become material only in the event that the amended certificates are declared to be ineffectual. On a question of such great importance and grave consequences judicial opinions should be confined to a decision on the facts presented. If either amended certificate be a nullity it is the same as if neither had been made. We regard it as quite clear that the Speaker of the Assembly for 1903 could not in June, 1904, of his own motion, call at the office of the Secretary of State and make any substitution, alteration or addition to his original certificate attached to the original bill that would give the bill vitality. If the bill had no force
131 or effect as a law for more than a year after its passage, when on its face it purported to take effect immediately, the proposition that it could not thus be given life is too plain for argument. Obviously the consequence of a contrary ruling would be disastrous. There would then be no certainty even as to the statutory law. The presiding officer of either body after the adjournment of the Legislature and even after the body which enacted the law ceased to exist, could call at the office of the Secretary of State and so alter his certificate that that which was law before would be law no longer and that which was not law would be infused with life. It is manifest, therefore, that the *amended* certificates must be disregarded.

The *original* certificates to which we are confined like the certificate of the Secretary of State printed in the Session Laws, fail to show, as has been seen, that the constitutional three fifths quorum was present in each house when the bill was passed and it must fail unless recourse may be had to the journals of the respective houses. Section 40 of the Legislative Law is as follows:

"Certificate of the Presiding Officer—Upon the passage of a bill or concurrent resolution by either house, the presiding officer thereof shall append to such bill or resolution, a certificate of the date of its passage by the votes of a majority of all the members elected to such house; or in the presence of three fifths of such members, if such be the case; or by the votes of two thirds of all the members elected to such house, as the case may be. No bills shall be deemed to have so passed unless certified by the presiding officer, which certificate to such effect shall be conclusive evidence thereof."

The learned counsel for the appellant contends that the Legislature acting within its province to prescribe rules of evidence, has, by this statute, prescribed a *conclusive* rule of evidence for determining whether a bill has been passed by the requisite vote and with the requisite quorum present. Literally construed this statute
132 provides that no bill requiring the presence of three fifths of the members elected to each house shall be deemed to have passed in the presence of such quorum unless the presiding officer appends a certificate thereto to that effect and if he does so certify that shall be conclusive, even though it be untrue either through mistake

or design. There is a conflict in judicial decisions, leaving the law in a doubtful and unsettled state as to whether and when resort may be had to the journals of the respective houses to show by what vote a bill was passed and the number of members present. I think this is largely owing to a failure to distinguish between the power of the Legislature to enact rules of evidence in general, where it is unrestricted by the Constitution, and its power to enact rules of evidence with respect to the proving the enactment of statutes where the Constitution itself prescribes how the vote shall be taken, how the number of members present shall be shown and how the record thereof shall be made and preserved. Section 2 of Article III of the State Constitution requires that each house shall keep a journal of its meetings. Section 25 of Article III of the State Constitution provides that:

"On the final passage, in either house of the Legislature, of any act which imposes, continues or revives a tax, or creates a debt or charge, or makes, continues or revives any appropriation of public or trust money or property, or releases, discharges or commutes any claim or demand of the State, the question shall be taken by yeas and nays, which shall be duly entered upon the journals, and three-fifths of all the members elected to either house shall, in all such cases, be necessary to constitute a quorum therein." There is much force in the contention that these constitutional provisions constitute the journals the original evidence of the vote and quorum present on the passage of bills and were designed to afford definite and conclusive evidence of those facts (Cooley's Cons. Lim., 7th Ed., 201). The journals are kept under the direction of the respective legislative bodies and are scrutinized, corrected and approved after being written out. It is of course competent for the Legislature
133 to provide secondary evidence of what these journals show as to the vote and quorum; and it would be quite inconvenient, and might endanger the permanency of the records, to be obliged in all cases to have recourse to the original journals. I know of no authority found in the Constitution or elsewhere by which it is competent for the Legislature this year to prescribe that the will of the people manifested, through their chosen senators and members next year and recorded and authenticated as provided by the Constitution for the enactment of a valid law, may be thwarted because, forsooth, the Legislature this year has assumed to enact as a rule of evidence that if the respective presiding officers shall fail to certify the passage of the bill correctly it shall not become a law. It seems to me this is tantamount to holding that the Legislature, itself the creature of the Constitution, is superior to its creator and may add to the constitutional requirements as to what is essential to the enactment of a particular law. If this section of the legislative law be valid, the law making power has been transferred to the presiding officers; and if they should certify erroneously that a bill had passed which in fact had failed of passage or should fail to certify to the passage of a bill passed by the requisite vote and with a quorum present, the bill which did not pass would become a valid law and the bill which did would not. I am of opinion that the law

ought to be and is that if a bill be passed by the essential constitutional vote and in the presence of the requisite constitutional quorum and these facts be duly recorded in the journals of the respective houses as required by the Constitution and the bill subsequently receives the Executive approval or the constitutional equivalent or substitute therefor,—it becomes a law regardless of whether the respective presiding officers have performed their duties with respect to certification enjoined on them by the Legislature. The Constitution recognizes only the Assembly, Senate and Governor as the law making power and it does not vest the presiding officer of
134 either body with any authority to defeat the legislative will.

I am aware that there are judicial decisions entitled to great weight holding that on grounds of public policy it is better that the due passage of a law should be determined by an examination of the certificates attached thereto rather than by consulting the journals of the legislative bodies and as it is not necessary to decide the question now it will be left open. It was entirely competent for the Legislature to make those certificates presumptive evidence of the facts and to declare that presumptively a bill should not be deemed passed by the necessary vote and with the necessary quorum present unless so certified; but in so far as it attempted to make the certificate conclusive evidence on those points I think it exceeded its authority. It is perhaps unnecessary to lay down even this broad doctrine in the case at bar. Some of the authorities are to the effect that the journals may be resorted to not for the purpose of impeaching but to supplement the certificates of the presiding officers where they are defective. Under a literal reading of the statute (§40, of the Legislative Law, which is in the disjunctive) it would not seem necessary that the certificates should show that a majority voted for the bill but only that it passed with three fifths present, yet doubtless they should show both facts. It has been held in analogous cases that where the certificates do not show all the essential facts they are defective and that the omission therein of the requisite vote or quorum may be supplied by the journals notwithstanding the fact that the statute expressly provides that in the absence from the certificate of the essential requirement to the valid enactment of the bill it shall be deemed not to have been passed by the requisite vote or quorum (Rumsey *v.* N. Y. & N. E. R. R., 130 N. Y., 88; Matter of New York & Long Island Bridge, 148 N. Y., 540; People *ex rel.* Scott *v.* Supervisors, 8 N. Y., 317; Purdy *v.* People, 4 Hill, 384). In People *ex rel.* Purdy *v.* Com. of Highways (54 N. Y., 356) the constitutional provisions as to the journals of the respective houses or their effect as evidence do not seem to have been
135 considered and the decision therein is inconsistent with the later opinions of the same court. According to the doctrine of those cases, therefore, the statute in so far as it declares that a bill shall not be deemed to have passed by the requisite vote or in the presence of the necessary quorum is not in any event to be deemed conclusive as to essential facts not expressly certified. By analogous reasoning a certification of the fact that a majority voted for the bill is not conclusive that three-fifths were not present and

the fact may be shown by the journals. In the case at bar the journals of the Senate and Assembly show that this bill was duly passed by more than a majority vote and in the presence of more than three-fifths of all the members elected to each house. I am, therefore, of opinion that the statute was duly enacted and is valid.

It follows that the order should be affirmed with $10 costs and disbursements.

All concur.

136 *Order of Appellate Division Affirming Order of the Surrogate.*

At a Term of the Appellate Division of the Supreme Court in and for the First Department held at the Appellate Division Court House in the County of New York on the 30th day of December, 1905.

Present: Hon. Morgan J. O'Brien, P. J.; Hon. Edward Patterson, Hon. George L. Ingraham, Hon. Frank C. Laughlin, Hon. John Proctor Clarke.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

An appeal having been taken by Carolyn Foster Stickney, as executrix, and Robert I. Jenks and John G. Hannah, as executors of the last will and testament of Joseph Stickney, deceased, and Carolyn Foster Stickney, in her individual capacity and as widow and devisee of said Joseph Stickney, deceased, to the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department, from an order of the Surrogate's Court of the County of New York, made and entered herein in the office of the Clerk of the Surrogate's Court of said county on the 7th day of July, 1905, affirming an order theretofore made and entered herein on the 11th day of November, 1904, in so far as said order fixes a tax upon the real property of the above-named decedent upon the ground that Chapter 41 of the Laws of

137 1903, providing for the taxation of real property, is unconstitutional and void.

And said appeal having come on to be heard before this Court, after hearing Edward Mitchell, Esq., of counsel for the appellants and George M. Judd, Esq., of counsel for the respondent, and due deliberation having been had:

Now, on motion of Edward H. Fallows, attorney for the State Comptroller, respondent, it is

Ordered and adjudged that the order appealed from be and the same hereby is affirmed with ten dollars costs and disbursements to the said respondent against said appellants.

Enter.

M. J. O'B., *J. S. C.*

138 *Notice of Appeal to the Court of Appeals.*

Court of Appeals, State of New York.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

CAROLYN FOSTER STICKNEY, as Executrix; ROBERT I. JENKS and JOHN G. HANNAH, as Executors of the Last Will and Testament of Joseph Stickney, Deceased, and CAROLYN FOSTER STICKNEY, in Her Individual Capacity and as Widow and Devisee, Appellants.

SIRS: Please take notice that Carolyn Foster Stickney, as executrix, and Robert I. Jenks and John G. Hannah, as executors of the last will and testament of Joseph Stickney, deceased, and Carolyn Foster Stickney, in here individual capacity, and as widow and divisee of said Joseph Stickney, deceased, appeal to the Court of Appeals from the order of the Appellate Division of the Supreme Court, First Department, in this proceeding dated the thirtieth day of December, 1905, and filed in the office of the Clerk of the Surrogate's Court, in and for the County of New York, on the twelfth day of January, 1906, which order affirmed the order of the Surrogate's Court of the County of New York, made and entered therein in the office of the Clerk of the Surrogate's Court on the seventh day of July, 1905, affirming the assessment of a transfer tax on the
139 real property of the decedent passing to his widow, and from each and every part of said order.

Dated New York, January 22, 1906.

Yours, &c.,

MITCHELL & MITCHELL,
Attorneys for Carolyn Foster Stickney and Others, Executors, and Carolyn Foster Stickney, Individually and as Widow and Devisee of Joseph Stickney, Deceased.

To the Clerk of the Surrogate's Court of the County of New York. Edward H. Fallows, Esq., Attorney for the Comptroller of the State of New York.

Waiver of Certification.

Court of Appeals, State of New York.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

It is hereby stipulated, pursuant to Section 2567 of the Code of Civil Procedure, that the foregoing is a copy of the order of the Appellate Division of the Supreme Court, First Department, dated December 30, 1905, and filed in the office of the Clerk of the Surro-

gate's Court, County of New York, on the 12th day of Janu-
140 ary, 1906, appealed from, and of all the papers upon which said order was founded and on which the Court below acted in making said order, and of the opinion of the Appellate Division, and of the notice of appeal to the Court of Appeals, and it is stipulated that the same shall be and constitute the record and return in this proceeding upon the appeal herein to the Court of Appeals from said order of said Appellate Division, and that the said appeal be heard and determined by the Court of Appeals upon the same with the same force and effect as if the said order, opinion and notice of appeal and other papers were duly certified as required by law and returned as the record upon this appeal by the Clerk of the Surrogate's Court, County of New York, and we hereby waive certification thereof by the Clerk.

Dated New York, January 24, 1906.

MITCHELL & MITCHELL,
Attorneys for Appellants.

EDWARD H. FALLOWS,
Attorney for the Comptroller of the State of New York, Respondent.

141 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at the Capitol, in the City of Albany, on the 1st day of May in the year of our Lord one thousand nine hundred and six before the Judges of said Court.

Witness the Hon. Edgar M. Cullen, Chief Judge Presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur May 2d, 1906.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

Be it remembered, That on the 12th day of February in the year of our Lord one thousand nine hundred and six Carolyn Foster Stickney, as Executrix &c. and others, &c. the appellants in this proceeding came here into the Court of Appeals by Mitchell & Mitchell, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The Comptroller of the State of New York, the respondent in said proceeding afterward appeared in said Court of Appeals by Edward H. Fallows, his attorney.

Which said Notice of Appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Edward Mitchell, of counsel for the appellants, and by Mr. Charles O. Maas, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of

the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is affirmed, with costs.

142 And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Surrogate's Court of New York County, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Surrogate's Court of New York County before the Surrogates thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Surrogate's Court before the Surrogates thereof &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, May 2d, 1906.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said proceeding in the Court of Appeals, with the papers originally filed therein attached thereto.

[L. S.] W. H. SHANKLAND, *Clerk.*

143 *Copy Decision by Court of Appeals.*

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY.

Decided May 1, 1906.

Edward Mitchell for appellants.
Charles O. Maas for respondent.

Per Curiam: It has been held by this Court that where the Session Laws show a statute to have been passed, but the certificates of the presiding officers of both houses attached to the original bill are defective in failing to show that the requisite number of members were present or voted therefor, recourse may be had to the journals of the two houses to support the validity of the enactment. (Matter of N. Y. & L. I. R. R. Co., 148 N. Y., 540.) An appeal to those journals shows that when the statute now under review, the enactment of which is challenged, was passed, there was present in each house of the legislature the requisite constitutional number of members, to wit, three-fifths. It is contended, however, that the authenticity of the journals of the legislature, certified copies of which were put in evidence, was not established, and that with the failure of any original

record certified extracts therefrom were not competent. Without expressing any opinion on this objection it is sufficient to say that the question has now been set at rest by the enactment, since the argument of the appeal, of chapter 240 of the Laws of 1906, which in express terms declares the printed copies to be the original journals of the two houses and makes them, or copies thereof, competent evidence when certified by the respective clerks of the Senate and Assembly.

The order should be affirmed, with costs.

Cullen, Ch. J., O'Brien, Haight, Vann, Werner, Willard, Bartlett and Hiscock, JJ., concur.

Order affirmed.

I certify the foregoing to be a correct & true copy of the opinion handed down May 1, 1906, by the Court of Appeals of the State of New York, in the above entitled action, & of the whole thereof.

E. A. BEDELL,
State Reporter.

C.

Filed Dec. 28, 1906, Surrogate's Court, N. Y. County.

144 At a Surrogate's Court held in and for the County of New York at the County Court House in the Borough of Manhattan in the City of New York, on the 22nd day of June 1906.

Present: Hon. Frank T. Fitzgerald, Surrogate.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

An order having been entered in this proceeding on the 11th day of November 1904 assessing a transfer tax, pursuant to the provisions of Chapter 41 of the Laws of 1903, upon the transfer of certain real property passing by virtue of the provisions of the last will and testament of said decedent to his widow;

And an appeal having been taken from said order by the appellants to the Surrogate on or about the 16th day of November 1904 on the ground that said Chapter 41 of the laws of 1903 was unconstitutional and void for the reasons set forth in said notice of appeal, and an order having been duly entered in the Office of the Clerk of this Court on the 7th day of July 1905 affirming the previous order of this Court appealed from.

And an appeal having been taken by the appellants herein to the Appellate Division on the 14th day of July 1905 and an order having been duly entered in the office of the Clerk of the said Court on or about the 30th day of December 1905 affirming the order of the Surrogate's Court appealed from, and an appeal having been
145 taken from said last mentioned order by the appellants herein to the Court of Appeals on or about the 22nd day of January, 1906, and said order of the Appellate Division having been affirmed by said Court and a remittitur having been sent down from said

Court and filed in this Court on the 3rd day of May 1906 and a motion for a re-argument in the Court of Appeals having been made by the appellants herein on the 26th day of May 1906, and an order denying said motion for re-argument having been sent down from the Court of Appeals and filed in this Court on the 20th day of June 1906;

Now on reading the said remittitur from the Court of Appeals and the said order denying the motion for re-argument in the same Court, and on motion of Edward H. Fallows, Attorney for the State Comptroller, respondent herein, it is

Ordered and adjudged that the order and judgment of said Court of Appeals be and the same is hereby made the order and judgment of this Court; and it is

Further ordered and adjudged that the respondent herein recover from the appellants herein the sum of Two hundred thirty six and seventy one hundredth- dollars ($236 70-100), the amount of his costs and disbursements as taxed in this proceeding, and that said respondent have execution therefor.

(S'g'd) FRANK T. FITZGERALD, *Surrogate.*

145½ Take notice that the within is a copy of an order this day duly entered in the within entitled proceeding, in the office of the Clerk of this Court.

Dated, New York, (Manhattan,) June 22 1906.

Yours, &c., EDWARD H. FALLOWS,
Attorney for State Comptroller, 170 *Broadway* (*Manhattan*), *New York City.*

[Endorsed:] Surrogate's Court, New York County. In the matter of the transfer tax upon the estate of Joseph Stickney, deceased. Copy Original Order making order of the Court of Appeals order of the Surrogate's Court. Edward H. Fallows, Attorney for State Comptroller, Office and P. O. Address, 170 Broadway, Manhattan, New York City. To Mitchell & Mitchell Att'ys for Appellants Filed June 22/06 Rec'd June 27/06.

146 STATE OF NEW YORK:

In Court of Appeals.

At a Court of Appeals for the State of New York, held at the Capitol in the City of Albany, on the second day of November A. D. 1906.

Present: Hon. Edgar M. Cullen, Chief Judge, presiding.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

Upon motion of Messrs. Mitchell & Mitchell, attorneys for the appellants in the above entitled proceeding,

Ordered, that a copy of the printed papers submitted to this Court

on behalf of the appellants, upon their motion for re-argument, together with the certificate of the Clerk of this court attached thereto, be transmitted to the Surrogate's Court of New York County, to be filed in said Surrogate's Court as a part of the original record on file in that court in this matter.

(A copy.)

JOHN CLINTON GRAY,
Senior Assot. Judge Ct. of Appeals.

(A copy.)
[SEAL.]

W. H. SHANKLAND, *Clerk.*

147 Court of Appeals, Clerk's Office.

I, W. H. Shankland, Clerk of the Court of Appeals of the said State of New York, do hereby certify that the motion for re-argument &c., in the Matter of the Transfer Tax upon the Estate of Joseph Stickney, deceased, of which a copy of notice and brief in support is hereto annexed—was made and submitted to the Court of Appeals on June 4, 1906; that said motion was denied, with ten dollars costs, on June 12, 1906, and that no opinion was delivered on the decision of the motion.

In witness whereof, I have hereunto set my hand and affixed my official seal, at the City of Albany, this fifteenth day of June, A. D. 1906.

[SEAL.]

W. H. SHANKLAND, *Clerk.*

148 Court of Appeals, State of New York.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

CAROLYN FOSTER STICKNEY, as Executrix, and ROBERT I. JENKS and JOHN G. HANNAH, as Executors, of the Last Will and Testament of Joseph Stickney, Deceased, and CAROLYN FOSTER STICKNEY, in Her Individual Capacity and as Widow and Devisee, Appellants.

OTTO KELSEY, Comptroller of the State of New York, Respondent.

Notice of Motion for Re-argument and a Hearing.

Opinion Court of Appeals.

Brief in Support of Motion for Re-argument.

Mitchell & Mitchell, Attorneys for Appellants, 44 & 46 Wall Street, Borough of Manhattan, New York City.

Edward H. Fallows, Attorney for Respondent, Comptroller of the State of New York, 170 Broadway, Borough of Manhattan, New York City.

148½ Court of Appeals, State of New York.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

CAROLYN FOSTER STICKNEY, as Executrix, and ROBERT I. JENKS and JOHN G. HANNAH, as Executors, of the Last Will and Testament of Joseph Stickney, Deceased, and CAROLYN FOSTER STICKNEY, in Her Individual Capacity and as Widow and Devisee, Appellants.

OTTO KELSEY, Comptroller of the State of New York, Respondent.

Notice of Motion for Re-argument and a Hearing.

To Edward H. Fallows, Esq., Attorney for Comptroller of the State of New York, Respondent.

SIR: Please take notice that on Monday, the fourth day of June, 1906, at the opening of the Court on that day, we shall move this Court, at the Capitol in the City of Albany, on the papers on
149 appeal, on the briefs of both parties heretofore filed in this Court, and on the decision of the Court of Appeals, dated May 1, 1906, a copy of which is printed herewith,

I. For an order of this Court requesting the return to this Court of the remittitur, heretofore sent down and now on file in the office of the Clerk of the Surrogate's Court of the County of New York, no order having been entered thereon; and thereupon

II. For an order (*a*) granting a re-argument of the appeal of the appellants in the above entitled matter, and (*b*) for a hearing on the validity and effect of Chapter 240 of the Laws of 1906, and for such other or further relief in the premises as to the Court may seem just.

The grounds upon which said re-argument and said hearing will be asked are stated in the annexed brief of the appellants on the motion for a re-argument and hearing on the validity and effect of Chapter 240 of the Laws of 1906.

Dated New York, May 26, 1906.

MITCHELL & MITCHELL,
Attorneys for Appellants.

44 and 46 Wall Street, Manhattan, New York City.

150 *Copy Decision by Court of Appeals.*

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY.

Decided May 1, 1906.

Edward Mitchell for appellants.
Charles O. Maas for respondent.

Per Curiam: It has been held by this Court that where the Session Laws show a statute to have been passed, but the certificates of

the presiding officers of both houses attached to the original bill are defective in failing to show that the requisite number of members were present or voted therefor, recourse may be had to the journals of the two houses to support the validity of the enactment. (Matter of N. Y. & L. I. R. R. Co., 148 N. Y., 540). An appeal to those journals shows that when the statute now under review, the enactment of which is challenged, was passed, there was present in each house of the legislature the requisite constitutional number of members, to wit, three-fifths. It is contended, however, that the authenticity of the journals of the legislature, certified copies of which were put in evidence, was not established, and that with the failure of any original record certified extracts therefrom were not competent. Without expressing any opinion on this objection it is sufficient to say that the question has now been set at rest by the enactment, since the argument of the appeal, of Chapter 240 of the Laws of 1906, which in express terms declares the printed copies to be the original journals of the two houses and makes them, or copies thereof, competent evidence when certified by the respective clerks of the Senate and Assembly.

The order should be affirmed, with costs.

Cullen, Ch. J., O'Brien, Haight, Vann, Werner, Willard, Bartlett and Hiscock, JJ., concur.

Order affirmed.

151 Court of Appeals, State of New York.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

CAROLYN FOSTER STICKNEY, as Executrix, and ROBERT I. JENKS and JOHN G. HANNAH, as Executors, of the Last Will and Testament of Joseph Stickney, Deceased, and CAROLYN FOSTER STICKNEY, in Her Individual Capacity and as Widow and Devisee, Appellants.

OTTO KELSEY, Comptroller of the State of New York, Respondent.

Brief of Appellants on Motion for Re-argument and for a Hearing on the Validity and Effect of Chapter 240 of the Laws of 1906.

March 5, 1906.—This cause was argued and submitted to the Court of Appeals.

April 16, 1906.—Chapter 240 of the Laws of 1906, became a law.

152 May 1, 1906.—The decision of this Court in the above matter was handed down. It was based upon the authority of Chapter 240 of the Laws of 1906, which it states was enacted "since the argument of the appeal."

See Opinion, p. 3.

The appellants move for a reargument and for a hearing in the above-entitled matter on the following grounds:

I.

The appellants have not been heard and have had no opportunity to be heard in regard to the validity, proper construction, and the legal effect of Chapter 240 of the Laws of 1906. Although, after the oral argument, a letter on behalf of the appellants was addressed on April 19, 1906, to the Court requesting that "In case your Honor-"able Court should consider that it (the Act) has any bearing what-"ever on the question which has been already argued and submitted, "your Honors should order a reargument or direct the filing of "briefs on the validity and effect of Chapter 240 of the Laws of "1906," such application was not formal and hence probably not ruled upon by the Court.

II.

We do not need to challenge the validity and effect of Chapter 240 of the Laws of 1906 so far as the same may apply to legal proceedings instituted after the date of that act. We strenuously contend that the effect which has been given to it by this Court in the present proceeding is opposed to all those principles of jurisprudence
153 which have been universally recognized as sound and would sanction an oppressive and dangerous precedent.

III.

The effect given by this Court to Chapter 240 of the Laws of 1906 is the same as if the Legislature of 1906 had passed a law enacting that Chapter 41 of the Laws of 1903 should be deemed for all purposes to have been passed in the presence of a quorum of three-fifths and that all proceedings theretofore taken under Chapter 41 of the Laws of 1903 should be confirmed as legal and valid assessments without any further notice to the appellants, or other persons, against whom taxes had been assessed thereunder, and as if this Court had construed and decided such a law to be constitutional and valid for the purpose of taking the property of the taxpayer for the payment of the tax. The constitutional right of the citizen, under this form of assessment and taxation is to have due notice under a law validly passed, and in effect at the date of instituting proceedings thereunder, and no legislation by retroactive enactments should be permitted to deprive any citizens of this right. The effect given by this Court to the Act of 1906 is to permit the respondent to avail himself of new legislation, which by its terms is only prospective, but yet is now construed and decided to apply to and bind parties in proceedings long since concluded below; and to validate a tax imposed without any legal evidence in existence, at the time the proceedings below were instituted, heard and determined, that Chapter 41 of the Laws of 1903 had the effect of a valid law at such time.

154 IV.

In conclusion, appellants respectfully pray that this Honorable Court will grant a re-argument of the present appeal and afford an opportunity to be heard on the contention that said Chapter 240 of the Laws of 1906 does not apply to proceedings pending in this Court, according to settled rules of statutory construction; and that if construed to have any such retroactive effect, it would be in violation of the Constitution of the State of New York and of the Fourteenth Article of Amendments to the Constitution of the United States in that it would impose and exact a tax and the State would deprive the appellants of property without due notice and without due process of law. Obviously, the appellants have never had any day in Court to be heard upon the validity and effect of this legislation enacted after the oral argument and submission of the case; and justice, it is earnestly submitted, requires that they should be afforded such a hearing before their rights are finally concluded.

Dated New York, May 26, 1906.

MITCHELL & MITCHELL,
Attorneys for Appellants,

44 and 46 Wall Street, New York, N. Y.

EDWARD MITCHELL,
Of Counsel.

I hereby admit due and timely service of *three* copies of the foregoing papers and that no order has been entered on the remittitur.

Dated New York, May 26, 1906.

EDWARD H. FALLOWS,
Attorney for Comptroller of the State of New York.

155 Surrogate's Court, County of New York.

In the Matter of the Transfer Tax Upon the Estate of JOSEPH STICKNEY, Deceased.

Edward H. Fallows, Esq., Attorney for the Comptroller of the State of New York, Respondent.

SIR: You will please take notice that on Friday, November 23, 1906, at 10:30 o'clock in the forenoon at Chambers of this Court at the County Court House in the Borough of Manhattan in the City of New York we will move on all the papers herein as well upon those referred to in the order of affirmance entered and filed with the Clerk of the Surrogate's Court on the 22nd day of June, 1906, as upon the other papers herein filed in the said Court on the 5th day of November, 1906, pursuant to an order of the Court of Appeals dated November 2, 1906, and upon said order so filed, for an order in the form annexed hereto, re-settling and amending *nunc pro tunc* as of June

22, 1906, the order in this matter dated, entered and filed with the Clerk of this Court on said 22nd day of June, 1906.

Dated, New York, November 19th 1906.

Yours, &c.,

MITCHELL & MITCHELL,
Attorneys for Petitioners-Appellants.

Office & P. O. Address: 44 Wall St. Borough of Manhattan, City of New York.

156 We hereby admit due and sufficient service of the foregoing Notice of Motion and form of proposed Order.

Dated, New York, November 19th 1906.

——— ———,
Attorney for the Comptroller of the State of New York.

157 At a Surrogate's Court held in and for the County of New York at the County Court House in the Borough of Manhattan in the City of New York on the 19th day of December, 1906.

Present: Hon. Frank T. Fitzgerald, Surrogate.

In the Matter of the Transfer Tax Upon the Estate of JOSEPH STICKNEY, Deceased.

Upon reading and filing the notice of motion annexed hereto of Mitchell & Mitchell, attorneys for Carolyn Foster Stickney and others, appellants, and the admission of due service of said notice upon Edward H. Fallows, Esq., attorney for the Comptroller of the State of New York, respondent, it is, on motion of Mitchell & Mitchell

Ordered that the order of affirmance entered and filed herein with the Clerk of this Court on the twenty-second day of June, 1906, be and the same hereby is re-settled and amended *nunc pro tunc* as of June 22, 1906, to read as follows:—

"At a Surrogate's Court held in and for the County of New York at the County Court House in the Borough of Manhattan, in the City of New York, on the 22nd day of June 1906.

Present: Hon. Frank T. Fitzgerald, Surrogate.

158 In the Matter of the Transfer Tax Upon the Estate of JOSEPH STICKNEY, Deceased.

An order having been entered in this proceeding on the 11th day of November 1904 assessing a transfer tax, pursuant to the provisions of Chapter 41 of the Laws of 1903, upon the transfer of certain real property passing by virtue of the provisions of the last will and testament of said decedent to his widow;

And an appeal having been taken from said order by the appellants to the Surrogate on or about the 16th day of November 1904 on the ground that said Chapter 41 of the laws of 1903 was unconsti-

tutional and void for the reason set forth in said notice of appeal, and an order having been duly entered in the office of the Clerk of this Court on the 7th day of July 1905 affirming the previous order of this Court appealed from

And an appeal having been taken by the appellants herein to the Appellate Division on the 14th day of July 1905 and an order having been duly entered in the office of the Clerk of the said Court on or about the 30th day of December 1905 affirming the order of the Surrogate's Court appealed from, and an appeal having been taken from said last mentioned order by the appellants herein to the Court of Appeals on or about the 22nd day of January, 1906, and said order of the Appellate Division having been affirmed by said Court and a remittitur having been sent down from said Court and
159 filed in this Court on the 3rd day of May 1906 and a motion for a re-argument etc. in the Court of Appeals having been made by the appellants herein on the twenty-sixth day of May, 1906, which was submitted to the Court of Appeals on June 4, 1906, which was denied with Ten Dollars costs on June 12, 1906, no opinion having been delivered on the decision of the motion, as appears by the certificate of the Clerk of the Court of Appeals dated November 2, 1906, and an order denying said motion for re-argument having been sent down from the Court of Appeals and filed in this Court on the twentieth day of June, 1906, and the Court of Appeals having by an order dated the second day of November, 1906, directed that a copy of the printed papers submitted to said Court of Appeals on behalf of the appellants upon their motion for re-argument, etc. together with the certificate of the Clerk of said Court attached thereto be transmitted to the Surrogate's Court of New York County to be filed in said Surrogate's Court as a part of the original record on file in that Court in this matter, and a certified copy of said order of November 2, 1906, and all the said papers therein referred to having been sent down from the Court of Appeals and filed in this Court on the fifth day of November, 1906,

Now on reading the said remittitur from the Court of Appeals and the said order denying the motion for re-argument in the same Court, and all of said papers referred to in said order of the Court of Appeals dated November 2, 1906, and on motion of Edward H. Fallows, attorney for the State Comptroller, respondent, herein, it is

Ordered and adjudged that the order and judgment of said Court of Appeals be and the same is hereby made the order and
160 judgment of this Court; and it is

Further ordered and adjudged that the respondent herein recover from the appellants herein the sum of Two hundred thirty six and seventy one hundredth dollars ($236-70/100), the amount of his costs and disbursements as taxed in this proceeding, and that said respondent have execution therefor."

FRANK T. FITZGERALD, *Surrogate.*

160½ [Endorsed:] Surrogate's Court, County of New York. In the matter of the transfer tax upon the estate of Joseph Stick-

ney deceased. Copy. Notice of motion and proposed order. Mitchell & Mitchell, Attorneys for petitioners-appell'ts 44 & 46 Wall Street, New York City. To —— —— Esq., Attorney for —— ——. Due and timely service of —— is hereby admitted. Dated —— 190–. —— —— Attorney for —— ——. Filed Nov. 20, 1906, Surrogates Court New York County.

161 In the Supreme Court of the United States.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

CAROLYN FOSTER STICKNEY, as Executrix, and ROBERT I. JENKS and JOHN G. HANNAH, as Executors of the Last Will and Testament of Joseph Stickney, Deceased, and CAROLYN FOSTER STICKNEY, in Her Individual Capacity and as Widow and Devisee, Original Appellants and Plaintiffs in Error,

against

OTTO KELSEY, Comptroller of the State of New York, Original Respondent and Defendant in Error.

Petition for Writ of Error.

To the Supreme Court of the United States:

The petition of Carolyn Foster Stickney as Executrix and Robert I. Jenks and John G. Hannah as Executors of the Last Will and Testament of Joseph Stickney, deceased, and Carolyn Foster Stickney in her individual capacity and as widow and devisee, respectfully shows as follows:

I. Prior to the enactment of Chapter 41 of the Laws of 1903, real property passing to the widow of a decedent was not subject to any transfer tax under the Laws of the State of New York.

II. In Volume I of the Session Laws of 1903 of the State of New York, at pages 165 and 166, will be found the following:

162 "CHAP. 41.

An Act to amend the tax law relating to exceptions and limitations in the taxation of taxable transfers.

Became a law, March 16, 1903, with the approval of the Governor. *Passed, a majority being present.*"

This attempted amendment consisted in subjecting real property of the value of Ten thousand dollars or more, passing from a husband to his widow, to a transfer tax of one per cent.

III. The Constitution of the State of New York in effect in 1895 and ever since, Article III Section 25, provides as follows:

"On the final passage, in either house of the legislature, of any act which imposes, continues or revives a tax, or creates a debt or charge, or makes, continues or revives any appropriation of public or trust money or property, or releases, discharges or commutes any

claim or demand of the State, the question shall be taken by yeas and nays, which shall be duly entered upon the journals, and three-fifths of all the members elected to either house shall in all such cases, be necessary to constitute a quorum therein."

IV. 1903, December 21. Joseph Stickney, the testator, died seized of certain real property in the state of New York, which he devised to Carolyn Foster Stickney, his widow, for life with absolute power to her to dispose of the same for her own benefit or otherwise by any written instrument made by her after his death.

V. Chapter 53, Laws of 1894, of the State of New York, amending Section 40 of the Legislative Law, Chapter 682, Laws of
163 1892, of the State of New York, contains the following:

"S. 40. *Certificate of Presiding Officer. Upon the passage of a bill* or concurrent resolution by either house, the presiding officer thereof shall append to such bill or resolution a certificate of the date of its passage by the votes of a majority of all the members elected to such house; or in the presence of three-fifths of such members, if such be the case; or by the votes of two-thirds of all the members elected to such house, as the case may be. *No bills* shall be deemed to have *so passed unless* certified by the presiding officer, *which certificate to such effect* shall be *conclusive evidence thereof.*"

VI. 1904, April 12. The Secretary of State of the State of New York certified that he had compared a copy of Chapter 41 of the Laws of 1903 and of the certificates of the presiding officers of the Senate and Assembly of the State of New York appended thereto with the original law and certificates then on file in his office.

These certificates are perfect and complete and are on printed blanks, the only writing being the dates and signatures indicated by italics below. They are in due form for all "majority bills," free from defects and clerical errors. They read as follows:

"STATE OF NEW YORK, *Feb. 26, 1903.*

In Senate.

This bill was duly passed, a majority of all the Senators elected voting in favor thereof.

By order of the Senate,

FRANK W. HIGGINS, President.

"STATE OF NEW YORK, *March 11, 1903.*

IN Assembly.

This bill was duly passed, a majority of all the members elected to the Assembly voting in favor thereof.

By order of the Assembly,

S. F. NIXON, Speaker."

164 VII. 1904, May 9. In the affidavit of Robert I. Jenks, one of the said Executors, filed in this matter, it was objected that said Chapter 41 of the Laws of 1903

"purports to impose, continue or revive a tax, or create a debt or charge, and is unconstitutional, invalid and void, for the reason that said Act was 'passed, a majority being present,' and that a quorum of three-fifths of all the members elected to either House was not present on the final passage of said Act, as will conclusively appear by the certificates of the presiding officers of the two Houses of the Legislature appended to said original Act, or by a duly certified copy of said Act and of said certificates of the presiding officers of said two Houses."

VIII. 1904, June 30. For the first time, the so-called "amended certificates" of the ex-presiding officers of the Senate and Assembly of 1903 and their affidavits "were filed in the office of the said Secretary of State and attached to said Chapter 41 original Laws of 1903, on file" in that office. A certified copy of these papers is Comptroller's Exhibit No. 1, July 12, 1904.

IX. 1904, July 12. In the proceedings before the Appraiser, these papers were offered in evidence by the counsel for the Comptroller and objected to by the counsel for the Executors and devisee, which objection the Appraiser overruled, and to which ruling an exception was taken.

X. The counsel for the Executors thereupon called the attention of the Appraiser to said Chapter 41 of the Laws of 1903 as published in the Session Laws under the authority of the said Secretary of State, which shows that a majority only was present and not three-fifths, and under the Legislative Law this is presumptive
165 evidence that three-fifths were not present. He also offered in evidence a certified copy, made by the said Secretary of State, dated April 12, 1904, of Chapter 41 of the Laws of 1903, and of the certificates of the President of the Senate and of the Speaker of the Assembly which are appended to the original Act then on file in the office of the Secretary of State, this paper having been received by such counsel on April 13, 1904, from the office of the Secretary of State in Albany, New York, which paper was received and marked Executors' Exhibt A, the original of which certificates are and were made conclusive evidence by said chapter 53 of said Laws of 1894.

XI. The counsel for the Comptroller then offered in evidence a certified copy of extract from the Senate Journal of Thursday, February 26, 1903, for the purpose of showing that Chapter 41 of the Laws of 1903 was passed three-fifths of the members elected to the Senate being present.

XII. The following colloquy then took place, and the following objection was made, and exception taken, by the counsel for the Executors and devisee:

"By Mr. MITCHELL: May I ask whether that is a copy of the printed journal?

By Mr. JUDD: That I cannot tell you.

By Mr. MITCHELL: May I ask whether there is any manuscript journal?

By Mr. JUDD: That I cannot tell you.

By Mr. MITCHELL: I object, on the ground that the paper offered is incompetent, irrelevant and immaterial; that the original Senate

Journal, if produced, is not a record either at common law or by statute, and cannot be introduced in evidence, and cannot be resorted to by the Court for the purpose either of validating or impeaching any law, and that the legislative law makes the certificates
166 of the presiding officers conclusive evidence as to whether the majority were present or three-fifths, and the conclusive evidence is that there was only a majority present and not three-fifths.

Objection overruled by the Appraiser.

Exception.

Paper marked Comptroller's Exhibit 2."

XIII. The following proceedings were thereupon had under objection and exception by the counsel for the Executors and devisee:

"By Mr. JUDD: I further offer in evidence in this connection a certified copy of an extract from the Assembly Journal of Wednesday, March 11, 1903, on final passage, of Chapter 41 of the Laws of 1903, showing that three-fifths of all the members elected to the Assembly were present on that occasion.

By Mr. MITCHELL: I make the same objection to that as I did to the copy of the Journal of the Senate, and the same objection if the original were produced.

Objection overruled by the Appraiser.

Exception.

(Paper marked Comptroller's Exhibit 3.)

By Mr. JUDD: I also offer in evidence the affidavit of Alfred E. Marling, verified July 5th, 1904, showing the market value as of December 21, 1903, the date of decedent's death, of the following premises:"

Then follows reference to the real property of the decedent, situate in the State of New York and devised to said Carolyn Foster Stickney by said will of said Joseph Stickney, deceased.

"By Mr. MITCHELL: I object to the Appraiser receiving any evidence in regard to the value of the real estate, or of appraising any real estate in this proceeding for the purpose of this transfer tax, on the ground that there is no valid law which imposes any tax on real estate passing from a husband to a widow.

Objection overruled by the Appraiser.

Exception.

(Paper marked Comptroller's Exhibit No. 4.)

By Mr. JUDD: I also offer in evidence the affidavit of Alfred E. Marling, verified June 9th, 1904, showing the market value as of December 21, 1903, the date of decedent's death, of the follow-
167 ing premises: No. 112 West 56th Street, and No. 874 Fifth Avenue, Borough of Manhattan, New York City.

By Mr. MITCHELL: I make the same objection to the appraisal of this appraiser and to the appraising of this real estate and any other real estate in this matter that I did to the last appraisal.

Objection overruled by the Appraiser.

Exception.

(Marked Comptroller's Exhibit 5.)

XIV. 1904, October 14. The Appraiser filed his report dated October 12, 1904.

XV. 1904, November 11. Mr. Surrogate Fitzgerald made an order on this report fixing the tax on the said real property at $6,678.85.

XVI. 1904, November 16. The executors and devisee served Notice of Appeal to the Surrogate from the report of the Appraiser and the order entered thereupon fixing the tax and stating the grounds of their appeal.

XVII. 1905, June 8. The opinion of Mr. Surrogate Fitzgerald affirming the order assessing the transfer tax was filed.

XVIII. 1905, July 7. An order by Mr. Surrogate Fitzgerald at a Surrogate's Court was made in all respects affirming the order appealed from.

XIX. 1905, July 14. Notice of Appeal to the Appellate Division of the Supreme Court of the State of New York for the First Department from said order of affirmance was given.

XX. 1905, December 30. The opinion of the said Appellate Division by Mr. Justice Laughlin affirming the order below assessing the transfer tax was filed.

XXI. 1905, December 30. An order of the said Appellate Division, First Department, was made affirming the order
168 appealed from.

XXII. 1906, January 22. Notice of appeal to the Court of Appeals of the State of New York, the same being the highest court of the State in which a decision in the same could be had, from said order was given.

XXIII. 1906, March 5. The appeal to the Court of Appeals was argued and submitted.

XXIV. 1906, April 16, Chapter 240 of the Laws of 1906, entitled "An Act to amend the legislative law relative to legislative journals" became a law with the approval of the Governor, and contains the following provision:

"The journals of proceedings of each house, heretofore published and now in the custody of its clerk, shall be deemed for all purposes to be the original journals of the proceedings of such house."

XXV. 1906, May 1. The Court of Appeals announced its decision as follows:—

"In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY.

Decided May 1, 1906.
Edward Mitchell for appellants.
Charles O. Maas for respondent.

Per Curiam.—It has been held by this Court that where the Session Laws show a statute to have been passed, but the certificates of the presiding officers of both houses attached to the original bill are defective in failing to show that the requisite number of members were present or voted therefor, recourse may be had to the journals of the two houses to support the validity of the enactment. (Matter of N. Y. & L. I. R. R. Co., 148 N. Y. 540.) An appeal to those journals shows that when the statute now under review the enact-

ment of which is challenged, was passed, there was present in each house of the legislature the requisite constitutional number of members, to wit, three-fifths. It is contended, however, that the authenticity of the journals of the legislature, certified copies of which were put in evidence, was not established, and that with the failure
169 of any original record certified extracts were not competent.

Without expressing any opinion on this objection it is sufficient to say that the question has now been set at rest by the enactment, since the argument of the appeal, of chapter 240 of the Laws of 1906, which in express terms declares the printed copies to be the original journals of the two houses and makes them, or copies thereof, competent evidence when certified by the respective clerks of the Senate and Assembly.

The order should be affirmed, with costs.

Cullen, Ch. J. O'Brien, Haight, Vann, Werner, Willard, Bartlett and Hiscock, JJ., Concur

Order affirmed."

XXVI. 1906, May 1st. The Court of Appeals made a final judgment or order, directing that the said judgment or order of the Appellate Division of the Supreme Court and of the Surrogates' Court so appealed from, be affirmed, and that the record be remitted to the Surrogate's Court in and for the County of New York, State of New York, to be enforced accor-ing to law; that said record was thereupon so remitted accordingly.

XXVII. 1906, May 26. The appellants moved the Court of Appeals

I. For an order requesting the return to that Court of the remittitur, and thereupon

II. For an order (*a*) granting a re-argument of the appeal of the appellants in the above-entitled matter, and (*b*) for a hearing on the validity and effect of Chapter 240 of the Laws of 1906, on the following grounds:

"1. The appellants have not been heard and have had no opportunity to be heard in regard to the validity, proper construction, and the legal effect of Chapter 240 of the Laws of 1906. Although, after the oral argument, a letter on behalf of the appellants was addressed on April 19, 1906, to the Court requesting that: "In case your
170 Honorable Court should consider that it (the Act) has any bearing whatever on the question which has been already argued and submitted, your Honors should order a reargument or direct the filing of briefs on the validity and effect of Chapter 240 of the Laws of 1906," such application was not formal and hence probably not ruled upon by the Court.

"2. We do not need to challenge the validity and effect of Chapter 240 of the Laws of 1906 so far as the same may apply to legal proceedceedings instituted after the date of that act. We strenuously contend that the effect which has been given to it by this Court in the present proceeding is opposed to all those principles of jurisprudence which have been universally recognized as sound and would sanction an oppressive and dangerous precedent.

"3. The effect given by this Court to Chapter 240 of the Laws of 1906 is the same as if the Legislature of 1906 had passed a law en-

acting that Chapter 41 of the Laws of 1903 should be deemed for all purposes to have been passed in the presence of a quorum of three-fifths and that all proceedings theretofore taken under Chapter 41 of the Laws of 1903 should be confirmed as legal and valid assessments without any further notice to the appellants, or other persons, against whom taxes had been assessed thereunder, and as if this Court had construed and decided such a law to be constitutional and valid for the purpose of taking the property of the taxpayer for the payment of the tax. The constitutional right of the citizen, under this form of assessment and taxation is to have due notice under a law validly passed, and in effect at the date of instituting proceedings thereunder, and no legislation by retroactive enactments should be permitted to deprive any citizen of this right. The effect given by this Court to the Act of 1906 is to permit the respondent to avail himself of new legislation, which by its terms is only prospective, but yet is now construed and decided to apply to and bind parties in proceedings long since concluded below; and to validate a tax imposed without any legal evidence in existence, at the time the proceedings below were instituted, heard and determined, that Chapter 41 of the Laws of 1903 had the effect of a valid law at such time.

"4. In Conclusion, appellants respectfully pray that this Honorable Court will grant a reargument of the present appeal and
171 afford an opportunity to be heard on the contention that said Chapter 240 of the Laws of 1906 does not apply to the proceedings pending in this Court, according to the settled rules of statutory construction; and that if construed to have any such retroactive effect, it would be in violation of the Constitution of the State of New York and of the Fourteenth Article of Amendments to the Constitution of the United States in that it would impose and exact a tax and the State would deprive the appellants of property without due notice and without due process of law. Obviously, the appellants have never had any day in Court to be heard upon the validity and effect of this legislation enacted after the oral argument and submission of the case; and justice, it is earnestly submitted, requires that they should be afforded such a hearing before their rights are finally concluded."

XXVIII. 1906, June 12. The Court of Appeals made a final judgment or order denying said motion.

XXIX. 1906, June 22. Final judgment was entered in and by said Surrogates' Court, in obedience to the judgment or order of the Court of Appeals, of May 1, 1906, in form according to the law and practice of the State of New York, whereby it was adjudged that said judgment of the Court of Appeals be made the judgment or order of the said Surrogates' Court.

XXX. That in the said Court of Appeals there was drawn in question the validity of Chapter 41 of the Laws of 1903 of the State of New York, and of the authority exercised and to be exercised thereunder by the Surrogate; that in deciding such question, the
172 said Court of Apeals held that Chapter 240 of the Laws of 1906 set at rest any question as to the validity of said statute and of the authority of the Surrogate; that thereupon and as soon as the occasion arose, your petitioners by their motion of May 26th,

1906, presented to said Court of Appeals, questions of the validity and effect of Chapter 240 of the Laws of 1906, on the grounds that the State by means of Chapter 240 of the Laws of 1906 and of said decision of the Court of Appeals had and would deprive your petitioners of their property without due notice and without due process of law, and on the ground that said statute, and decision were repugnant to the Constitution of the United States, and the decision of the said Court of Appeals on this question held otherwise and in favor of its validity by denying said motion, and said Court of Appeals by such denial had overruled the said claims of your petitioner and decided in favor of the validity of said statute and of the authority exercised thereunder, to the prejudice of your petitioners, all of which will more in detail appear from the record and assignment of errors herein.

Wherefore, your petitioners pray for a writ of error directed
173 to the Court of Appeals in the State of New York commanding that Court to send a record of the motion of your petitioners, dated May 26th, 1906, and all things concerning the same, to the Justices of the Supreme Court of the United States; and also directed to the Surrogates' Court of the County of New York, State of New York, commanding that Court to send a record of the proceedings in the said proceeding aforesaid, and all things concerning the same, to the Justices of the Supreme Court of the United States, and for the usual citation, to the end that the records of the proceedings being inspected, the said Justices of the Supreme Court of the United States may cause further to be done herein, to correct all errors, what of right and according to the law and Constitution of the United States ought to be done.

And your petitioners will ever pray.

Dated New York, August 20, 1906.

EDWARD MITCHELL AND
WILLIAM MITCHELL,
Attorneys for Plaintiffs in Error, Office and Post-Office Address, 44 and 46 Wall Street, Borough of Manhattan, New York City.

(MITCHELL & MITCHELL.)

STATE OF NEW YORK,
County of New York, Southern District of New York, ss:

Robert I. Jenks being duly sworn, says that he is one of the Plaintiffs in Error herein, and that the foregoing petition is true to
174 the best of his knowledge, information and belief.

ROBERT I. JENKS.

Subscribed and sworn to before me this 20th day of August, 1906.

[Seal John D. Marston, Notary Public, Westchester County, N. Y.]

JNO. D. MARSTON,
Notary Public, Westchester County.

Certificate filed in New York County.
Allowed this — day of October, 1906.

174½ [Endorsed:] In the U. S. Supreme Court. In the Matter of the Transfer Tax upon the Estate of Joseph Stickney, Deceased, Carolyn Foster Stickney, as Executrix *et al.*, against Otto Kelsey, Comptroller of the State of New York. Petition for writ of error. Mitchell & Mitchell, Attorneys for Pl'ffs in Error, 44 Wall St. Borough of Manhattan, New York City. Filed Dec. 28 1906. Surrogate's Court N. Y. County. W. M.

175 In the Supreme Court of the United States.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

CAROLYN FOSTER STICKNEY, as Executrix, and ROBERT I. JENKS and JOHN G. HANNAH, as Executors, of the Last Will and Testament of Joseph Stickney, Deceased, and CAROLYN FOSTER STICKNEY, in Her Individual Capacity and as Widow and Devisee (Original Appellants and Plaintiffs in Error),

against

OTTO KELSEY, Comptroller of the State of New York (Original Respondent and Defendant in Error).

Assignment of Errors.

Afterwards, to wit, on the sixteenth day of October, in the year of our Lord, One thousand nine hundred and six, in this same Term before the Justices of the Supreme Court of the United States, at the Capitol, in the City of Washington, come Carolyn Foster Stickney, as Executrix, and Robert I. Jenks and John G. Hannah, as Executors of the Last Will and Testament of Joseph Stickney, deceased, and Carolyn Foster Stickney, in her individual capacity and as widow and devisee, the plaintiffs in error and appellants below, and by their attorneys, Edward Mitchell and William Mitchell (Mitchell & Mitchell), say that in the record, proceedings, decision and final judgment or order of the Court of Appeals of the State of New York, and of the Surrogate's Court of the County of New York and State of
176 New York aforesaid, in the above entitled suit or proceeding, there is a manifest error in this, to wit:

I. That by the record, aforesaid, it appears that the judgment or order aforesaid given, was given by the Court of Appeals of the State of New York against the said Carolyn Foster Stickney, as Executrix, and Robert I. Jenks and John G. Hannah, as Executors of the Last Will and Testament of Joseph Stickney, deceased, and Caroline Foster Stickney, in her individual capacity and as widow and devisee, plaintiffs in error, and in favor of Otto Kelsey, Comptroller of the State of New York, defendant in error, whereas, by the law of the land, the said judgment *out* to have been given for the said Carolyn Foster Stickney, as Executrix, and Robert J. Jenks and John G. Hannah, as Executors of the Last Will and Testament of Joseph Stickney, deceased, and Carolyn Foster Stickney, in her indi-

vidual capacity and as widow and devisee, against the said Otto Kelsey, Comptroller of the State of New York.

II. That the said Court of Appeals of the State of New York erred in holding and deciding that the order appealed from should be affirmed.

III. That the said Court of Appeals of the State of New York erred in holding and deciding that "Chapter 240 of the Laws of 1906" which was enacted "since the argument of the appeal" and "which in express terms declares the printed copies (of the journals of
177 the Legislature) to be the original journals of the two Houses and makes them or copies thereof competent evidence when certified by the respective clerks of the Senate and Assembly," had "set at rest" any question on the objection "that the authenticity of the journals of the Legislature, certified copies of which were put in evidence, was not established, and that *with the failure of any original record* certified extracts therefrom were not competent."

IV. That the said Court of Appeals of the State of New York by its decision impliedly admitting that there were no original journals of the Legislature of 1903 in existence, and that the authenticity of the journals, certified copies of which were put in evidence, was not established and that there was a failure of any original record, erred in holding and deciding that Chapter 240 of the Laws of 1906 set at rest the objection raised at the trial, on July 12, 1904, that the certified extracts from the unauthenticated printed journals were not competent proof that the requisite constitutional three-fiffths of the members of each house were present on the passage of Chapter 41 of the Laws of 1903.

V. That the said Court of Appeals of the State of New York erred in holding that Chapter 240 of the Laws of 1906 validated the order imposing the tax, although there was no legal evidence in existence at the time the proceedings below were instituted, heard and determined that Chapter 41 of the Laws of 1903 had the effect of
178 a valid law at such time.

VI. That the said Court of Appeals of the State of New York erred in holding and deciding that the motion for re-argument and for a hearing on the validity and effect of Chapter 240 of the Laws of 1906 should be denied; by reason of which denial, the said Court of Appeals has, in effect, held:

(*a*) that Chapter 240 of the Laws of 1906 should be construed to have a retroactive effect, and

(*b*) that such construction would not be in violation of the Fourteenth Article of the Amendments to the Constitution of the United States, and

(*c*) would not impose and exact a tax without due notice and without due process of law, and

(*d*) that the State would not by such act and such construction thereof deprive the plaintiffs in error of property without due notice and without due process of law; each of these grounds having been stated in the notice of said motion by the plaintiffs in error who then and there insisted upon their constitutional rights in such respects as soon as the occasion arose.

Wherefore, the said Carolyn Foster Stickney, as Executrix, and Robert I. Jenks and John G. Hannah, as Executors of the Last Will and Testament of Joseph Stickney, deceased, and Carolyn Foster Stickney, in her individual capacity and as widow and devisee, Plaintiffs in Error and Appellants below, pray that the said
179 final judgment or order of the Court of Appeals of the State of New York, and of the Surrogate's Court of the County of New York and State of New York, be reversed, annulled and altogether held for nothing, and that they be restored to all things which they have lost by occasion of the said judgment, etc., and that they may have such other and further relief, according to law, as to the court may seem just and proper.

EDWARD MITCHELL AND
WILLIAM MITCHELL
(MITCHELL & MITCHELL),
Attorneys for Plaintiffs in Error.

Office and Post Office address, 44 & 46 Wall Street, Borough of Manhattan, New York City.

179½ [Endorsed:] In the U. S. Supreme Court. In the matter of the transfer tax upon the estate of Joseph Stickney, deceased, Carolyn Foster Stickney, as Executrix *et al.*, against Otto Kelsey, Comptroller of the State of New York. Assignment of errors. Mitchell & Mitchell, Attorneys for Pl'ffs in Error, 44 Wall St. Borough of Manhattan, New York City. Filed Dec. 28 1906 Surrogate's Court N. Y. County.

180 In the Supreme Court of the United States.

In the Matter of the Transfer Tax upon the Estate of JOSEPH STICKNEY, Deceased.

CAROLYN FOSTER STICKNEY, as Executrix, and ROBERT I. JENKS and JOHN G. HANNAH, as Executors, of the Last Will and Testament of Joseph Stickney, Deceased, and CAROLYN FOSTER STICKNEY, in Her Individual Capacity and as Widow and Devisee, Original Appellants and Plaintiffs in Error,

against

OTTO KELSEY, Comptroller of the State of New York, Original Respondent and Defendant in Error.

Bond.

Know all men by these presents: That we, Carolyn Foster Stickney, as Executrix, and Robert I. Jenks and John G. Hannah, as Executors of the Last Will and Testament of Joseph Stickney, deceased, and Carolyn Foster Stickney, in her individual capacity and as widow and devisee, as Principals, and The United States Fidelity and Guaranty Company, a Corporation organized and existing un-

der and by virtue of the laws of the State of Maryland, and being authorized to transact business in the State of New York and in the District of Columbia, as Surety, are held and firmly bound unto Otto Kelsey, Comptroller of the State of New York, and his successor or successors in office, in the full and just sum of Five Hundred Dollars ($500.00), to be paid to the said Otto Kelsey, Comptroller of the State of New York, his successor or successors as afore-
181 said, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 18th day of October, in the year one thousand nine hundred and six.

Whereas, lately at a term of the Court of Appeals of the State of New York, in a suit depending in said Court entitled as hereinabove set forth, a judgment was rendered upon return from the Surrogate's Court, County of New York, State of New York, on May 1st, 1906, against the Principals named herein, who did thereupon obtain a writ of error and file a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Otto Kelsey, Comptroller of the State of New York, and his successor or successors in office, citing and admonishing him to be and appear at a Supreme Court of the United States at Washington, within — days from the date hereof.

Now, the condition, of the above obligation is such, that if the said Carolyn Foster Stickney, as Executrix, and Robert I. Jenks and John G. Hannah, as Executors of the Last Will and Testament of Joseph Stickney, deceased, and Carolyn Foster Stickney, in her individual capacity and as widow and devisee, shall prosecute their appeal to effect and answer all damages and costs if they fail
182 to make their plea good, then this obligation to be void, else to remain in full force and virtue.

CAROLYN FOSTER STICKNEY,
ROBERT I. JENKS,
JOHN G. HANNAH,
As Executors of the Last Will and Testament of Joseph Stickney, Deceased.
CAROLYN FOSTER STICKNEY.

Sealed and delivered in the presence of
LEON MALRAISON,
As to Robert I. Jenks and John G. Hannah, Executors.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By SYLVESTER J. O'SULLIVAN, *Manager.*

[Seal The United States Fidelity & Guaranty Company, Incorporated 1896.]

Attest:
GEORGE E. HAYES,
Attorney-in-Fact.

STATE OF NEW YORK, *County of New York, ss:*

On this 22nd day of October, 1906, before me personally came Robert I. Jenks and John G. Hannah, Executors of the Last Will and Testament of Joseph Stickney, deceased, to me known and known to me to be two of the individuals described in and who executed the foregoing Bond and they severally duly acknowledged to me that they executed the same as such Executors.

[Seal Leon Malraison, Notary Public, County of New York.]

LEON MALRAISON,
Notary Public, New York County, N. Y.

STATE OF MASSACHUSETTS, *County of Middlesex, ss:*

On this twenty fifth day of October, 1906, before me personally came Carolyn Foster Stickney to me known and known to me to be one of the individuals described in and who executed the foregoing Bond and she duly acknowledged to me that she executed the same in her individual capacity and also as executrix of the Last Will and Testament of Joseph Stickney, deceased.

[Seal Charles E. Stearns, Notary Public, Commonwealth of Massachusetts, U. S. A.]

CHARLES E. STEARNS,
Notary Public, Commonwealth of Massachusetts.

Approved:
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

Dec. 21, 1906.

183 *Affidavit, Acknowledgment, and Justification by the United States Fidelity and Guaranty Company.*

[Vignette.]

We will bond you.

Contract—Fidelity—Judicial—Burglary.

STATE OF NEW YORK, *County of New York, ss:*

Before me personaly came Sylvester J. O'Sullivan, known to me to be the Manager of The United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Carolyn Foster Stickney, as executrix, *et al.* as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the manager of said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State

of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Carolyn Foster Stickney, as executrix, *et al.* is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Manager of said Company; and that he is acquainted with George E. Hayes, and knows him to be Attorney in Fact of said Company; and that the signature of said George E. Hayes, subscribed to said bond is the genuine handwriting of said George E. Hayes, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceeds its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.)

[Seal The United States Fidelity & Guaranty Company, Incorporated 1896.]

SYLVESTER J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence this eighteenth day of October, 1906.

[Seal Daniel C. Deasy, Notary Public, New York County.]

DANIEL C. DEASY,
Notary Public, New York County.

183½ [Endorsed:] In the Supreme Court of the United States. In the Matter of the Transfer Tax upon the Estate of Joseph Stickney, deceased, Carolyn Foster Stickney, as Executrix, *et al.*, etc. Original Appellants & Pl'ff's in Error, against Otto Kelsey, Comptroller of the State of New York, Original Respondent and Defendant in Error. Bond. Filed Dec. 28, 1906. Surrogate's Court, N. Y. County.

184 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Surrogates of the Surrogates' Court in and for the County of New York, State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Surrogates' Court on a remittitur from the Court of Appeals of the State of New York, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Carolyn Foster Stickney, as Executrix, and Robert I. Jenks and John G. Hannah, as Executors, of the last will and testament of Joseph Stickney, deceased, and Carolyn Foster Stickney, in her

individual capacity and as widow and devisee, appellants, and Otto Kelsey, Comptroller of the State of New York, respondent, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the con-
185 struction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said appellants as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of December, in the year of our Lord one thousand nine hundred and six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

Service of a copy of the above writ of error is hereby admitted this twenty eighth day of December, 1906.

EDWARD H. FALLOWS,
Attorney for Defendant in Error, The Comptroller of the State of New York.

Filed Dec. 28, 1906, Surrogate's Court, N. Y. County.

186 UNITED STATES OF AMERICA, *ss:*

To Otto Kelsey, Comptroller of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Surrogate's Court in and for the County of New York, State of New York, wherein Carolyn Foster Stickney, as Executrix, and Robert I. Jenks and John G. Hannah, as Executors, of the last will and testament of Joseph Stickney, deceased, and Carolyn Foster Stickney, in her individual capacity, and as widow and devisee, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Rufus W. Peckham, Associate Justice of the Supreme Court of the United States, this 21st day of December, in the year of our Lord one thousand nine hundred and six.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

Service of a copy of the above citation is hereby admitted this twenty eighth day of December, 1906.

EDWARD H. FALLONS,
Attorney for Defendant in Error, The Comptroller of the State of New York.

Filed Dec. 28, 1906, Surrogate's Court, N. Y. County.

187 UNITED STATES OF AMERICA:

Surrogate's Court, County of New York.

STATE OF NEW YORK, *County of New York, ss:*

I, Daniel J. Dowdney, Clerk of the Surrogate's Court in said County, by virtue of the annexed writ of error, and in obedience thereto, do hereby certify, that the foregoing pages ending with number 186 contain a true and complete transcript of the record and proceedings had in the said Surrogate's Court and in the Court of Appeals of the State of New York, in the suit entitled: In the Matter of the Transfer Tax upon the Estate of Joseph Stickney, deceased; Carolyn Foster Stickney, as Executrix and Robert I. Jenks and John G. Hannah, as Executors, of the Last Will and Testament of Joseph Stickney, deceased, and Carolyn Foster Stickney in her individual capacity and as widow and devisee, plaintiffs in error and appellants below, against Otto Kelsey, Comptroller of the State of New York, defendant in error and respondent below: as the same remains of record and on file in my office, and that the same, together with the annexed

certified copy of the opinion of the Court of Appeals dated May 1, 1906, original petition for said writ of error, assignment of errors, bond, writ of error and citation to the defendant in error, all of which were received in my office on the twenty eighth day of December 1906, constitute the return to said writ of error.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Surrogate's Court this 4th day of January A. D. 1907.

[New York Surrogate's Seal.]

DANIEL J. DOWDNEY,
Clerk of the Surrogate's Court of the County of New York.

Endorsed on cover: File No. 20,523. New York county surrogate's court. Term No. 196. Carolyn Foster Stickney, as executrix, and Robert I. Jenks and John G. Hannah, as executors, of the last will and testament of Joseph Stickney, deceased, and Carolyn Foster Stickney, individually and as widow and devisee, plaintiffs in error, *vs.* Otto Kelsey, comptroller of the State of New York. Filed January 12th, 1907. File No. 20,523.

Supreme Court of the United States.

CAROLYN FOSTER STICKNEY, as Executrix, and ROBERT I. JENKS and JOHN G. HANNAH, as Executors of the Last Will and Testament of Joseph Stickney, deceased, and CAROLYN FOSTER STICKNEY, individually and as widow and devisee,

Plaintiffs in Error,

vs.

OTTO KELSEY, Comptroller of the State of New York.

October Term, 1907. No. 196.

In Error to the Surrogate's Court in and for the County of New York, State of New York.

This is a Writ of Error to the Surrogate's Court of the County of New York, State of New York, but its real purpose is to review:

I. A decision of the Court of Appeals of the State, sustaining an order of the Surrogate's Court which imposed a transfer tax under Chapter 41 of the Laws of 1903 upon the *real* property of Joseph Stick. ey, who died on December 21, 1903; the Court of Appeals' Decision of Affirmance declaring, in regard to the admis-

sion in evidence of certified copies of so-called journals of the Legislature, under the objection and exception of the plaintiffs in error, and in regard to our objection on the argument, when the printed books from which these extracts had been made were produced and inspected by the Court, that they were unauthenticated " and that with the failure of any original record certified extracts therefrom were not competent",

> " that the question has now been set at rest by the enactment since the argument of the appeal, of Chapter 240 of the Laws of 1906 " (pp. 91–92).

and

II. Another decision of this same Court denying a motion of the plaintiffs in error for a re-argument and for a hearing on the validity and effect of Chapter 240 of the Laws of 1906. (Certificate of Clerk that said motion was made and submitted June 4, 1906; that said motion was denied on June 12, 1906, and that no opinion was delivered on the decision of the motion, p. 94.)

A Concise Abstract, or Statement of the Case.

This case arose under an order of the Surrogate's Court for the County of New York made and entered on the eleventh day of November, 1904, assessing a tax upon the estate of Joseph Stickney, deceased, the tax upon the *real* property amounting to $6,678.85 (pp. 68, 69, 70); from so much of which order as fixed the tax upon the *real* property at $6,678.85, or any tax upon said *real* property, an appeal was taken (pp. 70, 71, 72, 73, and 74).

Prior to the enactment of Chapter 41 of the Laws of 1903, *real* property passing to the widow of a decedent

was not subject to any transfer tax under the laws of the State of New York.

> "§ 221. EXCEPTIONS AND LIMITATIONS.—When the property or any beneficial interest therein passes by any such transfer to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of a son or the husband of a daughter, or any child or children adopted as such in conformity with the laws of this State, of the decedent, grantor, donor, or vendor or to any person to whom any such decedent, grantor, donor or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, or to any lineal descendant of such decedent, grantor, donor or vendor born in lawful wedlock, such transfer of property shall not be taxable under this act, unless it is *personal property* of the value of ten thousand dollars or more, in which case it shall be taxable under this act at the rate of one per centum upon the clear market value of such property."
>
> (Laws 1896, Chapter 908, Article X, Taxable Transfers, Section 221.)

The following provision of the Constitution of the State of New York was in force at the time of the passage of Chapter 41 of the Laws of 1903.

Article III., Section 25, of the Constitution of the State of New York reads:

> "On the final passage, in either House of the Legislature, of any act which imposes, continues or revives a tax, or creates a debt or charge, * * * the question shall be taken by yeas and nays, which shall be duly entered upon the journals *and three-fifths of all the members elected to either House shall, in all such cases, be necessary to constitute a quorum therein.*"
>
> (Birdseye's Revised Statutes, Codes and General Laws, Third Edition, Volume I., page 674.)

The first sentence of the last paragraph of Article III., Section 18, of the Constitution of the State of New York, reads :

> " The legislature shall pass general laws providing for the cases enumerated in this section, and for all other cases which in its judgment may be provided for by general laws."
>
> (Birdseye's Revised Statutes, Codes and General Laws, Third Edition, Volume I., page 673.)

Pursuant to this last provision of the Constitution, Chapter 682 of the Laws of 1892, entitled :

> " An Act in relation to legislation, constituting Chapter VIII. of the General Laws ",

became a law on May 18, 1892.

Section 40 and Section 44 of this Legislative Law as amended in 1894, read as follows :

> " § 40. *Certificate of Presiding Officer. Upon the passage of a bill* or concurrent resolution by either house, the presiding officer thereof shall append to such bill or resolution a certificate of the date of its passage by the votes of a majority of all the members elected to such house ; or in the presence of three-fifths of such members, if such be the case ; or by the votes of two-thirds of all the members elected to such house, as the case may be. *No bills* shall be deemed to have *so passed unless* certified by the presiding officer, *which certificate to such effect shall be conclusive evidence thereof* ".
>
> (Chap. 53, Laws of 1894, amending Section 40 of the Legislative Law, Chap. 682, Laws 1892.)

> " § 44. STATEMENT IN SESSION LAWS AS TO PASSAGE OF LAW. In the publication of every law the secretary of state shall omit the certificates ap-

pended thereto, but shall cause to be inserted immediately under the title of the law, a statement to the effect that it became a law upon the properly specified date, with or without the approval of the governor, or notwithstanding his objections, as the case may be, and adding the words 'passed by a two-thirds vote,' 'passed, three-fifths being present,' or 'passed, a majority being present,' in accordance with the certificates appended to the original bill. Such statement shall be presumptive evidence that the original law was certified by the presiding officer of each house accordingly."

(Chap. 53, Laws of 1894, amending Section 44, of the Legislative Law, Chap. 682, Laws of 1892.)

In Volume I. of the Session Laws of 1903, at the opening page, appears the following :

"CERTIFICATE.

OFFICE OF THE SECRETARY OF STATE, OF THE STATE OF NEW YORK.

ALBANY, June 1, 1903.

Pursuant to the directions of chapter 682, Laws 1892, entitled 'The Legislative Law,' I hereby certify that the following volume of the Laws of this State was printed under my direction.

JOHN F, O'BRIEN,
Secretary of State."

In this Volume, at pages 165 and 166, will be found the following :

"CHAP. 41.

An Act to Amend the Tax Law, Relating to Exceptions and Limitations in the Taxation of Taxable Transfers.

Became a Law, March 16, 1903, with the approval of the Governor. *Passed, a majority being present.*" (Italics are ours.)

This supposed law was intended to amend Section 221 of the Tax Law and so much of the amendment as bears on this case reads as follows:

> "§ 221. EXCEPTIONS AND LIMITATIONS,—When property real or personal or any beneficial interest therein, of the value of less than ten thousand dollars, passes by any such transfer to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of a son or the husband of a daughter, or any child or children adopted as such in conformity with the laws of this state, of the decedent, grantor, donor or vendor, or to any child, to whom any such decedent, grantor, donor or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday and was continuous for said ten years thereafter, or to any lineal descendant of such decedent, grantor, donor or vendor born in lawful wedlock, such transfer of property shall not be taxable under this act; if *real or* personal property, or any beneficial interest therein, so transferred is of the value of ten thousand dollars or more, it shall be taxable under this act at the rate of one per centum upon the clear market value of such property."

The amendment consisted in subjecting real property of the value of Ten thousand dollars or more, passing from a husband to his widow to a transfer tax of one per cent.

Section 2 provides that the Act should take effect immediately.

1903, December 21. Joseph Stickney, the testator, died, seized of certain real property which he devised to his widow for life with absolute power to her to dispose of the same for her own benefit, or otherwise, by any written instrument made by her, after his

death. (See Will as to No. 874 Fifth Avenue and No. 112 West 56th Street, p. 15 ; also as to his residuary real estate, see p. 17.)

1904, April 12. The Secretary of State certified that he had compared a copy of Chapter 41 of the Laws of 1903 and of the certificates of the presiding officers of the Senate and Assembly appended thereto with the original law and certificates then on file in his office.

These certificates are perfect and complete and are on printed blanks, the only writing being the dates and signatures indicated by italics below. They are in due form for all "majority bills," free from defects and clerical errors. They read as follows:

"STATE OF NEW YORK,

In Senate, *Feb. 26, 1903.*

This bill was duly passed, a majority of all the Senators elected voting in favor therof.

By order of the Senate,

Frank W. Higgins,
President.

"STATE OF NEW YORK,

In Assembly, *March 11, 1903.*

This bill was duly passed, a majority of all the members elected to the Assembly voting in favor thereof.

By order of the Assembly,

S. F. Nixon,
Speaker."

(See Executors' Exhibit A. 7-12-04 L. A. Z., pp. 66-67-68.)

1904, May 9. In the affidavit of Robert I. Jenks, one of the Executors, filed in this matter, it was objected that Chapter 41 of the Laws of 1903 "purports "to impose, continue or revive a tax, or create a debt "or charge, and is unconstitutional, invalid and void, "for the reason that said Act was 'passed, a majority

" ' being present,' and that a quorum of three-fifths of " all the members elected to either House was not " present on the final passage of said Act, as will con- " clusively appear by the certificates of the presiding " officers of the two Houses of the Legislature appended " to said original Act, or by a duly certified copy of " said Act and of said certificates of the presiding offi- " cers of said two Houses " (p. 10.)

1904, June 30. For the first time, the so-called " amended certificates " of the ex-presiding officers of the Senate and Assembly of 1903 and their affidavits " were filed in the office of the Secretary of State and attached to Chapter 41 original Laws of 1903, on file " in that office. A certified copy of these papers is Comptroller's Exhibit No. 1, July 12, 1904 (pp. 55, 56, 57, 58, 59, 60, 61.)

The so-called " amended certificates " are as follows :

" STATE OF NEW YORK, March 11th, 1903.
IN ASSEMBLY.

This Bill was duly passed, a majority of all the members elected to the Assembly voting in favor thereof, *three fifths being present.*

By order of the Assembly,

S. F. NIXON,
Speaker."

(p. 56.)

" STATE OF NEW YORK, Feb. 26th, 1903.
IN SENATE.

This Bill was duly passed, a majority of all the Senators elected voting in favor thereof, *three fifths being present.*

By order of the Senate.

FRANK W. HIGGINS,
President."

(p. 57.)

The Italics are ours, and indicate the only change from the original certificates ; the dates even, remain the same, although these amended certificates were not made or signed until June, 1904, more than a

month after the objection set forth in the affidavit of Mr. Jenks.

1904, July 12. In the proceedings before the Appraiser, these papers were offered in evidence by the counsel for the Comptroller and objected to (pp. 37–38) by the counsel for the Executors and devisee, which objection the Appraiser overruled, and to which ruling an exception was taken (p. 38).

The counsel for the Executors thereupon called the attention of the Appraiser to Chapter 41 of the Laws of 1903 as published in the Session Laws under the authority of the Secretary of State, which shows that a majority only was present and not three-fifths, and under the Legislative Law this is presumptive evidence that three-fifths were not present. He also offered in evidence a certified copy, made by the Secretary of State, dated April 12, 1904, of Chapter 41 of the Laws of 1903, and of the certificates of the President of the Senate and of the Speaker of the Assembly which are appended to the original Act then on file in the office of the Secretary of State, this paper having been received by such counsel on April 13, 1904, from the office of the Secretary of State in Albany, New York, which paper was received and marked Executors' Exhibit A. (See p. 38, as to the above statement; see pp. 66, 67, 68, for Executors' Exhibit A.)

The counsel for the Comptroller then offered in evidence a certified copy of extract from the Senate Journal of Thursday, February 26, 1903, for the purpose of showing that Chapter 41 of the Laws of 1903 was passed three-fifths of the members elected to the Senate being present. (p. 38.)

The record shows that the following objections were made, and exceptions taken, by the counsel for the Executors and devisee, and an exception taken to each ruling:

> "By Mr. Mitchell: May I ask whether that is a copy of the printed journal?
>
> By Mr. Judd: That I cannot tell you.

By Mr. Mitchell: May I ask whether there is any manuscript journal?

By Mr. Judd: That I cannot tell you.

By Mr. Mitchell: I object, on the ground that, the paper offered is incompetent, irrelevant and immaterial; that the original Senate Journal, if produced, is not a record either at common law or by statute, and cannot be introduced in evidence, and cannot be resorted to by the Court for the purpose either of validating or impeaching any law, and that the legislative law makes the certificates of the presiding officers conclusive evidence as to whether the majority were present or three-fifths, and the conclusive evidence is that there was only a majority present and not three-fifths.

Objection overruled by the Appraiser.

Exception.

(Paper marked Comptroller's Exhibit 2.)"

(pp. 38–39.

Exhibit printed at pp. 61–62.

The following proceedings were thereupon had under objection and exception by the counsel for the Executors and devisee:

By Mr. Judd: I further offer in evidence in this connection a certified copy of an extract from the Assembly Journal of Wednesday, March 11, 1903, on final passage, of Chapter 41 of the Laws of 1903, showing that three-fifths of all the members elected to the Assembly were present on that occasion.

By Mr. Mitchell: I make the same objection to that as I did to the copy of the Journal of the Senate, and the same objection if the original were produced.

Objection overruled by the Appraiser.

Exception.

(Paper marked Comptroller's Exhibit 3.)"

(p. 39.)

Exhibit 3 printed at pp. 62–63.

"By Mr. Judd: I also offer in evidence the affidavit of Alfred E. Marling, verified July 5th, 1904, showing the market value as of December 21, 1903, the date of decedent's death, of the following premises:"

Then follows reference to the real property of the decedent.

"By Mr. Mitchell: I object to the Appraiser receiving any evidence in regard to the value of the real estate, or of appraising any real estate in this proceeding for the purpose of this transfer tax, on the ground that there is no valid law which imposes any tax on real estate passing from a husband to a widow.

Objection overruled by the Appraiser.

Exception.

(Paper marked Comptroller's Exhibit No. 4.)" (p. 39.)

"By Mr. Judd: I also offer in evidence the affidavit of Alfred E. Marling, verified June 9th, 1904, showing the market value as of December 21, 1903, the date of decedent's death, of the following premises: No. 112 West 56th Street, and No. 874 Fifth Avenue, Borough of Manhattan, New York City.

By Mr. Mitchell: I make the same objection to the appraisal of this appraiser and to the appraising of this real estate and any other real estate in this matter that I did to the last appraisal.

Objection overruled by the Appraiser.

Exception.

(Marked Comptroller's Exhibit 5.)" (pp. 39–40.)

1904, October 14. The Appraiser filed his report, dated October 12, 1904 (pp. 40 to 48.)

1904, November 11. Mr. Surrogate Fitzgerald made an order on this report fixing the tax on the *real* property at $6,678.85 (p. 68.)

1904, November 16. The Executors and devisee served Notice of Appeal to the Surrogate from the report of the Appraiser and the order entered thereupon fixing the tax on *real* property, and stating the grounds of their appeal. (See Notice of Appeal, pp. 70 to 74.)

The opinion of Mr. Surrogate FITZGERALD affirming the order assessing the transfer tax will be found between pp. 74 and 80.

1905, July 7. An order by Mr. Surrogate FITZGERALD, at a Surrogate's Court was made in all respects affirming the order appealed from (pp. 80–81.)

1905, July 14. Notice of Appeal to the Appellate Division of the Supreme Court for the First Department from said order of affirmance was given (p. 81.)

The opinion of the Appellate Division by Mr. Justice LAUGHLIN affirming the order below assessing the transfer tax will be found between pp. 82 and 88.

1905, December 30. An order of the Appellate Division, First Department, was made affirming the order appealed from (p. 88.)

1906, January 22. Notice of Appeal to the Court of Appeals of the State of New York from said order was given (p. 89.)

1906, March 5. The appeal to the Court of Appeals was argued and submitted.

1906, April 16. Chapter 240 of the Laws of 1906, entitled "An Act to amend the legislative law relative to legislative journals" became a law with the approval of the Governor, and contains the following provision :

> "The journals of proceedings of each house, *heretofore published* and now in the custody of its clerk, shall be deemed for all purposes to be the original journals of the proceedings of such house."

1906, April 19. As appears by the Brief of appellants on motion for re-argument and for a hearing on the validity and effect of Chapter 240 of the Laws of

1906, a letter on behalf of the appellants was addressed on this day to the Court of Appeals requesting that—

> "In case your Honorable Court should consider that it (the Act) has any bearing whatever on the question which has been already argued and submitted, your Honors should order a re-argument or direct the filing of briefs on the validity and effect of Chapter 240 of the Laws of 1906" (p. 97.)

1906, May 1. The Court of Appeals announced its decision as follows :

> "IN THE MATTER OF THE TRANSFER TAX UPON THE ESTATE OF JOSEPH STICKNEY.
>
> Decided May 1, 1906.
> EDWARD MITCHELL for Appellants.
> CHARLES O. MAAS for Respondent.
>
> *Per Curiam.*—It has been held by this Court that where the Session Laws show a statute to have been passed, but the certificates of the presiding officers of both houses attached to the original bill are defective in failing to show that the requisite number of members were present or voted therefor, recourse may be had to the journals of the two houses to support the validity of the enactment. (Matter of N. Y. & L. I. RR. Co., 148 N. Y. 540.) An appeal to those journals shows that when the statute now under review the enactment of which is challenged, was passed, there was present in each house of the legislature, the requisite constitutional number of members, to wit, three-fifths. It is contended, however, that, the authenticity of the journals of the legislature, certified copies of which were put in evidence, was not established, and that with the failure of any original record certified extracts therefrom were not competent. Without expressing any opinion on this objection it is sufficient to say

that the question has now been set at rest by the enactment, since the argument of the appeal, of Chapter 240 of the Laws of 1906, which in express terms declares the printed copies to be the original journals of the two houses and makes them, or copies thereof competent evidence when certified by the respective clerks of the Senate and Assembly.

The order should be affirmed with costs.

CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER, WILLARD, BARTLETT and HISCOCK, JJ. Concur.

Order affirmed" (pp. 91–92).

1906, May 1st. The Court of Appeals made a final judgment or order, directing that the said judgment or order of the Appellate Division of the Supreme Court and of the Surrogates' Court so appealed from, be affirmed, and that the record be remitted to the Surrogates' Court in and for the County of New York, State of New York, to be enforced according to law; that said record was thereupon so remitted accordingly (pp. 90–91).

1906, May 26. The plaintiffs in error moved the Court of Appeals—

I. For an order requesting the return to that Court of the remittitur, and thereupon

II. For an order (*a*) granting a re-argument of the appeal of the appellants in the above-entitled matter, and (*b*) for a hearing on the validity and effect of Chapter 240 of the Laws of 1906, on the following grounds:

"1. The appellants have not been heard and have had no opportunity to be heard in regard to the validity, proper construction and the legal effect of Chapter 240 of the Laws of 1906. Although, after the oral argument, a letter on behalf of the appellants was addressed on April 19, 1906, to the Court requesting that: 'In case your Hon-'orable Court should consider that it (the act) has 'any bearing whatever on the question which has

' been already argued and submitted, your Honors ' should order a re-argument or direct the filing of ' briefs on the validity and effect of Chapter 240 ' of the Laws of 1906 ', such application was not formal and hence probably not ruled upon by the Court.

" 2. We do not need to challenge the validity and effect of Chapter 240 of the Laws of 1906 so far as the same may apply to legal proceedings instituted after the date of that act. We strenuously contend that the effect which has been given to it by this Court in the present proceeding is opposed to all those principles of jurisprudence which have been universally recognized as sound and would sanction an oppressive and dangerous precedent.

" The effect given by this Court to Chapter 240 of the Laws of 1906 is the same as if the Legislature of 1906 had passed a law enacting that Chapter 41 of the Laws of 1903 should be deemed for all purposes to have been passed in the presence of a quorum of three-fifths and that all proceedings theretofore taken under Chapter 41 of the Laws of 1903 should be confirmed as legal and valid assessments without any further notice to the appellants, or other persons, against whom taxes had been assessed thereunder, and as if this Court had construed and decided such a law to be constitutional and valid for the purpose of taking the property of the taxpayer for the payment of the tax. The constitutional right of the citizen, under this form of assessment and taxation is to have due notice under a law validly passed, and in effect at the date of instituting proceedings thereunder, and no legislation by retroactive enactments should be permitted to deprive any citizen of this right. The effect given by this Court to the Act of 1906 is to permit the respondent to avail himself of new legislation, which by its terms is only prospective, but yet is now construed and decided to apply to

and bind parties in proceedings long since concluded below; and to validate a tax imposed without any legal evidence in existence, at the time the proceedings below were instituted, heard and determined, that Chapter 41 of the Laws of 1903 had the effect of a valid law at such time.

"4. In Conclusion, appellants respectfully pray that this Honorable Court will grant a re-argument of the present appeal and afford an opportunity to be heard on the contention that said Chapter 240 of the Laws of 1906 does not apply to the proceedings pending in this Court, according to the settled rules of statutory construction; and that if construed to have any such retroactive effect, it would be in violation of the Constitution of the State of New York and of the Fourteenth Article of Amendments to the Constitution of the United States in that it would impose and exact a tax and the State would deprive the appellants of property without due notice and without due process of law. Obviously, the appellants have never had any day in Court to be heard upon the validity and effect of this legislation enacted after the oral argument and submission of the case; and justice, it is earnestly submitted, requires that they should be afforded such a hearing before their rights are finally concluded" (pp. 95, 96, 97, 98).

1906, June 12. The Court of Appeals made a final judgment or order denying said motion. (See Clerk's Certificate, p. 94.)

1906, June 22. Final judgment was entered in and by said Surrogate's Court, in obedience to the judgment or order of the Court of Appeals of May 1, 1906, whereby it was adjudged that said judgment of the Court of Appeals be made the judgment or order of the said Surrogate's Court. (pp. 92–93.)

1906, November 2. The Court of Appeals made an order that a copy of the printed papers submitted to

the Court on behalf of the appellants upon their motion for re-argument, together with the certificate of the Clerk of the Court attached thereto, be transmitted to the Surrogate's Court of New York County, to be filed in said Surrogate's Court as a part of the original record on file in that Court in this matter. This Order and the printed papers submitted, with the certificate of the Clerk, are at pages 93 to 98.

1906, December 19. Final judgment was entered in and by said Surrogate's Court amending *nunc pro tunc* the previous judgment of June 22, 1906, so as to include in the record the papers submitted to the Court of Appeals on behalf of the appellants upon their motion for re-argument, etc., under the order of the Court of Appeals, dated November 2, 1906 (pp. 99 to 101).

The Errors Relied Upon are as Follows

I. That the judgment or order of the Court of Appeals ought to have been given for the plaintiffs in error.

II. That the Court of Appeals erred in holding and deciding that the order appealed from should be affirmed.

III. That the said Court of Appeals of the State of New York erred in holding and deciding that "Chapter 240 of the laws of 1906" which was enacted "since the argument of the appeal" and "which in express terms declares the printed copies (of the journals of the Legislature) to be the original journals of the two Houses and makes them or copies thereof competent evidence when certified by the respective Clerks of the Senate and Assembly," had "set at rest" any question on the objection "that the authenticity of the journals of the Legislature, certified copies of which were put in evidence, was not established, and that *with the failure of any original record* certified extracts therefrom were not competent."

IV. That the said Court of Appeals of the State of

New York by its decision impliedly admitting that there were no original journals of the Legislature of 1903 in existence, and that the authenticity of the journals, certified copies of which were put in evidence, was not established and that there was a failure of any original record, erred in holding and deciding that Chapter 240 of the Laws of 1906 set at rest the objection raised at the trial, on July 12, 1904, that the certified extracts from the unauthenticated printed journals were not competent proof that the requisite constitutional three-fifths of the members of each house were present on the passage of Chapter 41 of the Laws of 1903.

V. That the said Court of Appeals of the State of New York erred in holding that Chapter 240 of the Laws of 1906 validated the order imposing the tax, although there was no legal evidence in existence at the time the proceedings below were instituted, heard and determined, that Chapter 41 of the Laws of 1903 had the effect of a valid law at such time.

VI. That the said Court of Appeals of the State of New York erred in holding and deciding that the motion for re-argument and for a hearing on the validity and effect of Chapter 240 of the Laws of 1906 should be denied; by reason of which denial, the said Court of Appeals has, in effect, held:

(a) That Chapter 240 of the Laws of 1906 should be construed to have a retroactive effect, and

(b) That such construction would not be in violation of the Fourteenth Article of the Amendments to the Constitution of the United States, and

(c) Would not impose and exact a tax without due notice and without due process of law, and

(d) That the State would not by such act and such construction thereof deprive the plaintiffs in error of property without due notice and without due process of law; each of these grounds having been stated in the notice of said motion by the plaintiffs in error who then and there insisted upon their constitutional rights in such respects as soon as the occasion arose. (pages 109–110)

A BRIEF OF THE ARGUMENT.

A person is deprived of his property without due process of law, in a case, where a death tax has been assessed in 1904 by a court under an act of the Legislature of 1903, which would have been declared never to have become a law if the objection to certain evidence had been sustained, and where such objection has been overruled by the highest Court of the State on the sole ground that " the question has now been " set at rest by the enactment, since the " argument of the appeal, of" an act of the Legislature of 1906.

I.

Chapter 41 of the Laws of 1903 would have been declared never to have become a law unless recourse may be had to the journals.

As the case comes to this Court, Chapter 41 of the Laws of 1903 would have been declared never to have become a law if our objection to the certified copies of the journals set forth in the *Record* (pp. 38 and 39), or if our objection to the printed journals, called in the certified copies " original journals," exhibited to and inspected by the Court of Appeals on the argument in that Court and found to be unauthenticated in any manner, had been sustained.

In delivering the Opinion at the Appellate Division, LAUGHLIN, J. held that this was a three-fifths bill and

under the Constitution should have been passed pursuant to Article III, Section 25. (*Record*, pp. 82 & 83.)

Then after referring to Section 44 of the Legislative Law, which relates to the publication of statutes by the Secretary of State, he held as follows:

> "The statute, therefore, as printed in the Session Laws only showed a majority present when it was passed which, I think, would be insufficient."
>
> (*Record*, pp. 83 & 84.)

Then, after considering the original certificates appended to the original bill and the so-called "amended certificates" he said:

> "It is manifest, therefore, that the *amended* certificates must be disregarded."
>
> (*Record*, p. 85.)

Thereafter, he takes up the original certificates appended to the bill and in regard to them he says that they

> "fail to show, as has been seen, that the constitutional three-fifths quorum was present in each house when the bill was passed and it must fail unless recourse may be had to the journals of the respective houses."
>
> (*Record*, p. 85.)

He concluded his Opinion in the following words:

> "In the case at bar the journals of the Senate and Assembly show that this bill was duly passed by more than a majority vote and in the presence of more than three-fifths of all the members elected to each house. I am, therefore, of opinion that the statute was duly enacted and is valid."
>
> (*Record*, p. 88.)

It is thus seen that as the case went to the Court of Appeals, the Act was held to be invalid and never to have had the effect of law without recourse to the journals of the two houses.

II.

The decision of the Court of Appeals Part I. Not decisive of this case.

Touching the first portion of the Decision of the Court of Appeals, reading as follows:

> "It has been held by this Court that where the Session Laws show a statute to have been passed, but the certificates of the presiding officers of both houses attached to the original bill are defective in failing to show that the requisite number of members were present or voted therefor, recourse may be had to the journals of the two houses to support the validity of the enactment. (Matter of N. Y. & L. I. R. R. Co., 148 N. Y., 540.)"
>
> *Record*, p. 91.

we submit that this portion of the decision *is in no respect decisive of the case, or of our objections.*

Our objection to the certified copies was that the originals if produced were not a record either at common law or by statute and could not be introduced in evidence, and on producing such original journals in the Court of Appeals they were shown to be unauthenticated.

The precise objection to the journals in the *Matter of N. Y. & L. I. B. Co.* (148 N. Y., p. 540) cited by the Court of Appeals in its decision does not appear in the report of that case, nor is there anything said in the opinion in that case which would indicate in any way

whatever that the objections made to the journals in the case at bar had been made in the *Bridge Company* case.

Surrogate FITZGERALD in delivering the opinion in the case at bar, referred to this *Bridge Company* case and to the opinion of the Appellate Division by Mr. Justice O'BRIEN in the same case (*Record*, p. 79) and concludes his quotation from 148 N. Y., p. 555, with the following :

> "While this decision is strictly dictum, yet it is the formal expression of the opinion of our highest tribunal, made after elaborate argument."
> *Record*, p. 80.

This characterization by the Surrogate of the *Bridge Company* case will be sustained by an examination of the text of Judge BARTLETT's opinion in 148 N. Y., at p. 555.

The main questions in the case had been previously disposed of by Judge BARTLETT in his Opinion between pages 546 and the second paragraph on page 555. The Opinion then proceeds (pp. 555–556) :

> "In order to keep this opinion within reasonable limits, we shall content ourselves with briefly stating the conclusions reached as to the other points presented by the appellant." (p. 555.)

He further declares :

> "There is no proof in this record that the title to lands taken was vested in the State of New York." (p. 555.)

Of course, if this were so, there was no need that the bill should have been passed by a two-thirds vote. The Session Laws showed that the Act in question had been passed three-fifths being present, and the certificates of the presiding officers of both Houses attached to the original bill on file in the office of Sec-

retary of State showed only the fact that three-fifths were present. (p. 556.)

As a two-thirds vote was not necessary, for the reason that the bill was held not to appropriate public moneys or property for local or private purposes, it was perfectly immaterial to the decision of that case whether the Act was a three-fifths bill or received a two-thirds vote.

Judge BARTLETT concluded this part of his Opinion in the following words :

> " We think it would defeat the provisions of the Constitution and the statute if in such an emergency as was here presented, recourse could not be had to the two journals of the two Houses."

" The Journals ". But the question always arises what are " the journals ". Distinguished text-writers on Constitutional Law have extolled the journals of the two Houses as entitled to the greatest weight as evidence, because the Constitutions of the United States and of most of our States have prescribed that each House shall keep a journal of its proceedings.

Without stopping to consider whether the framers of our Constitution really intended this clause to be self-executing and to prescribe what the Court should receive as evidence, the question still recurs as to what are " the journals " of the two Houses.

Having reference to rules of evidence, the original manuscript minutes of proceedings made by the Clerks would be the best evidence and the only journals contemplated by the Constitution.

Judicial tribunals of the highest authority have adopted views entirely opposite to these text-writers.

Mr. Justice HARLAN in *Field v. Clark* (143 U. S. Rep., at page 673), uses the following language in reference to journals :

> " The evils that may result from the recognition of the principle that an enrolled act, in the custody of the Secretary of State, attested by the

signatures of the presiding officers of the two houses of Congress, and the approval of the President, is conclusive evidence that it was passed by Congress, according to the forms of the Constitution, would be far less than those that would certainly result from a rule making the validity of Congressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them.

"The views we have expressed are supported by numerous adjudications in this country, to some of which it is well to refer. In *Pangborn v. Young*, 32 N. J. Law (3 Vroom) 29, 37, the question arose as to the relative value, as evidence of the passage of a bill, of the journals of the respective houses of the legislature and the enrolled act authenticated by the signatures of the speakers of the two houses and by the approval of the Governor. The bill there in question, it was alleged, originated in the house and was amended in the Senate, but, as presented to and approved by the Governor, did not contain all the amendments made in the Senate. Referring to the provision in the constitution of New Jersey, requiring each house of the legislature to keep a journal of its proceedings—which provision is in almost the same words as the above clause quoted from the Federal Constitution — the Court, speaking by Chief Justice BEASLEY, said that it was impossible for the mind not to incline to the opinion that the framers of the Constitution, in exacting the keeping of the journals, did not design to create records that were to be the ultimate and conclusive evidence of the conformity of legislative action to the constitutional provisions relating to the enactment of laws. In the nature of things, it was observed, these journals must have been constructed out of loose and hasty memoranda made in the

pressure of business and amid the distractions of a numerous assembly. The Chief Justice said: 'Can any one deny that, if the laws of the State 'are to be tested by a comparison with these 'journals, so imperfect, so unauthenticated, that 'the stability of all written law will be shaken to 'its very foundation? Certainly no person can 'venture to say that many of our statutes, perhaps 'some of the oldest and most important, those 'which affect large classes of persons or on which 'great interests depend, will not be found defective, 'even in constitutional particulars, if judged by 'this criterion * * * . In addition to these 'considerations, in judging of consequences, we 'are to remember the danger under the prevalence 'of such a doctrine to be apprehended from the 'intentional corruption of evidences of this char-'acter. It is scarcely too much to say that the 'legal existence of almost every legislative act 'would be at the mercy of all persons having 'access to these journals; for it is obvious that 'any law can be invalidated by the interpolation 'of a few lines or the obliteration of one name 'and the substitution of another in its stead. I 'cannot consent to expose the state legislation to 'the hazards of such probable error or facile 'fraud. The doctrine contended for on the part 'of the evidence has no foundation, in my estima-'tion, on any considerations of public policy.' The conclusion was, that upon grounds of public policy, as well as upon the ancient and well settled rules of law, a copy of a bill bearing the signatures of the presiding officers of the two houses of the legislature and the approval of the governor, and found in the custody of the Secretary of State, was conclusive proof of the enactment and contents of a statute, and could not be contradicted by the legislative journals or in any other mode. These principles were affirmed by the New Jersey Court of Errors

and Appeals in *Freeholders of Passaic v. Stevenson*, 46 N. J. Law (17 Vroom) 173, 184, and in *Standard Underground Co. v. Attorney General*, 46 N. J. Eq. (1 Dickinson) 270, 276.

"In *Sherman v. Story*, 30 California, 253, 275, the whole subject was carefully considered. The court, speaking through Mr. Justice SAWYER, said: 'Better, far better, that a provision should 'occasionally find its way into the statute through 'mistake, or even fraud, than that every act, state 'and national, should at any and all times be 'liable to be put in issue and impeached by the 'journals, loose papers of the legislature and 'parol evidence. Such a state of uncertainty in 'the statute laws of the land would lead to mis-'chiefs absolutely intolerable. * * * The re-'sult of the authorities in England and in the 'other states clearly is, that, at common law, 'whenever a general statute is misrecited, or its 'existence denied, the question is to be tried and 'determined by the court as a question 'of law—that is to say, the court 'is bound to take notice of it, and 'inform itself the best way it can; that there is 'no plea by which its existence can be put in 'issue and tried as a question of fact; that if the 'enrollment of the statute is in existence, the en-'rollment itself is the record, which is conclusive 'as to what the statute is, and cannot be im-'peached, destroyed or weakened, by the journals 'of Parliament or any other less authentic or 'less satisfactory memorials; and that there has 'been no departure from the principles of the 'common law in this respect in the United States, 'except in instances where a departure has been 'grounded on, or taken in pursuance of, some 'express constitutional or statutory provision re-'quiring some relaxation of the rule, in order that 'full effect might be given to such provisions; 'and in such instances the rule has been relaxed

' by judges with great caution and hesitation, and
' the departure has never been extended beyond
' an inspection of the journals of both branches of
' the legislature.' "

See, also, *State vs. Jones* (6 Washington, 452; same case, 34 Pac., 201).

The provisions of Chapter 240 of the Laws of 1906 in regard to the journals "hereafter published" show that the Legislature after the argument and submission to the Court of Appeals of this case, realized that the distinction that we have made as to the journals which have weight as evidence and those which have not weight as evidence, really existed, and the Legislature has somewhat tardily as we think, so far as this case is concerned, provided for just this distinction.

This Act, passed after the argument of the appeal, is an amendment to the Legislative Law of the State, and is the first positive statutory law in New York with reference to the keeping of the journals of the two Houses, but it leaves unamended and unrepealed Section 40 of the Legislative Law which still prescribes that the certificates of the Presiding Officers as to whether a bill was passed by the votes of a majority of all the members, or, in the presence of three-fifths, or, by the votes of two-thirds "shall be conclusive evidence thereof".

III.

The decision of the Court of Appeals, Part II. Decisive of this case.

Our Brief in the Court of Appeals contained the following statement and invitation:

"Our information is that there does not exist for the year 1903, or for many years prior to that

time, any written journal of any kind, or any original writings or memoranda from which the printed journals have been made; that the original writings and memoranda of the clerks are sent to the printer who does not return the same to the clerks either with the proof or afterwards and that such original writings and memoranda are subsequently destroyed by the printer; that if the proof sheets of the printed journal are ever corrected in the clerk's office they are not compared in the clerk's office with such original writings and memoranda; that, if the first proof has been corrected by the clerk and returned to the printer, there is thereafter no scrutiny or correction of the printed journal as it finally comes from the printer's office; and that even though the journal may have entered upon it a resolution approving of the journal of the preceding day, the journal of the preceding day is seldom, if ever, in fact read and does not purport to have been read.

We earnestly invite this Court for itself and in its own way to ascertain the facts in regard to the keeping and publishing of the journals prescribed by the Constitution and especially the journals for the year 1903."

This invitation was extended to the Court of Appeals partly in view of Mr. Justice MILLER's language in *Gardner v. Collector*, (6 Wall., p. 499, at p. 511) and reading as follows:

"We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law *of the existence of a statute*, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most ap-

> propriate, unless the positive law has enacted a different rule."

and partly in view of a quotation contained in the Opinion by Mr. Justice HARLAN in the case of *Field* vs. *Clark* (143 U. S., p. 649, at p. 675) in which, after referring to the rule of the common law excluding the journals of Parliament, it is said that in the exceptional case--

> "The rule has been relaxed by Judges with great caution and hesitation and the departure has never been extended beyond an inspection of the journals of both branches of the Legislature" (at p. 675)

This case of *Field* vs. *Clark* has been cited and followed by the United States Supreme Court in *Lyons* vs. *Woods*, (153 U. S., p. 649, at pp. 662-3); *Harwood* vs. *Wentworth* (162 U. S. R., p. 547, at p. 558).

From the foregoing Statement of the Case, it appears as follows:

Chapter 41 of the Laws of 1903, approved March 16, 1903, was intended to amend the Transfer Tax Law of the State so as to impose for the first time a tax at the rate of one per centum upon the clear market value of real property.

Joseph Stickney, the testator in this case, died on December 21, 1903, leaving real property upon which a tax was imposed under the provisions of the foregoing law amounting to $6,678.85 (p. 68).

In the course of the so-called trial before the Appraiser, on July 12, 1904, when Mr. Judd, the counsel for the Comptroller, offered a certified copy of an extract from the so-called Senate journal and another extract from the so-called Assembly journal, the record shows that the following objections were made by the plaintiff in error and that when they were overruled, an exception by the plaintiffs in error was taken to each ruling:

" By Mr. Judd : I further offer in evidence in this connection, certified copy of extract from the Senate Journal of Thursday, February 26, 1903, showing that Chapter 41 of the Laws of 1903 was passed three-fifths of the members elected to the Senate being present.

By Mr. Mitchell : May I ask whether that is a copy of the printed journal ?

By Mr. Judd : That I cannot tell you.

By Mr. Mitchell : May I ask whether there is any manuscript journal ?

By Mr. Judd : That I cannot tell you.

By Mr. Mitchell : I object, on the gound that the paper offered is incompetent, irrelevant and immaterial ; that the original Senate Journal, if produced, is not a record either at common law or by statute, and cannot be introduced in evidence, and cannot be resorted to by the Court for the purpose either of validating or impeaching any law, and that the legislative law makes the certificates of the presiding officers conclusive evidence as to whether the majority were present or three-fifths, and the conclusive evidence is that there was only a majority present, and not three-fifths.

Objection overruled by the Appraiser.

Exception.

(Paper marked Comptroller's Exhibit 2)

By Mr. Judd : I further offer in evidence in this connection a certified copy of an extract from the Assembly Journal of Wednesday, March 11, 1903, on final passage, of Chapter 41 of the Laws of 1903, showing that three-fifths of all the members elected to the Assembly were present on that occasion.

By Mr. Mitchell : I make the same objection to that as I did to the copy of the Journal of the Senate, and the same objection if the original were produced.

Objection overruled by the Appraiser.

Exception.
(Paper marked Comptroller's Exhibit 3.) "
(*Record*, pp. 38 & 39.)

On the argument in the Court of Appeals, on the request of the plaintiffs in error to the Clerks of the Senate and Assembly, they produced in Court the " original journals " referred to in their certificates and affidavits (pp. 62 and 64), and from which the papers in evidence (Exhibits 2 and 3) were extracts.

These journals were printed books and were exhibited to the Court for the purpose of showing that they were unauthenticated and were inspected by the Court.

[NOTE. In order to prevent any misunderstanding in regard to these printed books, we desire to state that when these books were produced by the Clerks of the Senate and Assembly on the argument in the Court of Appeals we made the statement according to our information that there was no certificate of any kind whatever in either book ; but before offering the books to the Court our attention was called to a slip pasted in at the end of the Senate Journal, and we thereupon stated to the Court that there seemed to have been recently pasted in a certificate which we then read to the Court, and which was dated September 1, 1905 ; adding that although the certificate was to the effect that the printed book was the original journal, it was manifest from an inspection of the book that it was not the original manuscript journal of the Senate.

No weight seems to have been attached to this certificate, as the Court of Appeals makes no reference to it in its decision, and there was no certificate whatever as to the authenticity of the Assembly journal when produced in the Court of Appeals.]

The following extract from the decision of the Court of Appeals shows that the Court in this part of its decision was considering the question which we presented on the argument on exhibiting the unauthenticated printed books called " original journals " of the

Senate and Assembly; and it is in response to our question as to what weight as evidence these unauthenticated printed books had upon the judicial mind of the Court, that the Court proceeded to say:

> "It is contended, however, that the authenticity of the journals of the Legislature, certified copies of which were put in evidence, was not established, and that with the failure of any original record certified extracts therefrom were not competent. Without expressing any opinion on this objection it is sufficient to say that the question has now been set at rest by the enactment, since the argument of the appeal, of Chapter 240 of the Laws of 1906, which in express terms declares the printed copies to be the original journals of the two houses and makes them, or copies thereof, competent evidence when certified by the respective clerks of the Senate and Assembly."
>
> (*Record*, pp. 91 & 92.)

The context of this part of the decision would indicate that the Court was in doubt as to whether these unauthenticated printed copies had any legal weight as evidence in the judicial mind, for they refer to our "objection" as "the question". They furthermore explicitly declare that they do not express any opinion on our objection; and they add

> "that the question has now been set at rest by the enactment, since the argument of the appeal, of Chapter 240 of the Laws of 1906".

We submit that our objection has thus been disposed of, not by the Court acting in a judicial capacity, interpreting and deciding the law, but by the Court simply as the mouthpiece of the Legislature, which, with the approval of the Governor of the State, enacted Chapter 240 of the Laws of 1906.

Chapter 240 of the Laws of 1906 is entitled:

" An Act to Amend the Legislative Law, Relative to Legislative Journals "

and became a law April 16, 1906 with the approval of the Governor.

The text of so much of the Act as is here referred to by the Court is as follows :

" The journals of proceedings of each house, *heretofore published* and now in the custody of its clerk, shall be deemed for all purposes to be the original journals of the proceedings of such house. The clerk of each house shall compare a printed volume or volumes of its journal of proceeding *hereafter published* under his direction from the original manuscript copy thereof, and having noted in such printed volume or volumes each error contained therein, shall attach thereto a certificate, under his hand and official seal, that each such printed volume or volumes was published under his direction and that, as corrected, it is a correct transcript of the text of such original manuscript copy. He shall thereupon deposit and keep such printed volume or volumes, so corrected and certified, in his custody, and the same shall thereupon become and be deemed for all purposes to be the original journal or journals of proceedings of such house ; and the same, or a copy certified by the clerk, may be read in evidence " (Laws of N. Y., 1906, Vol. I., pp. 471-2). (The italics are ours). (Printed in full, page 43, *post*).

Having reference to the italicized words, it will be seen, on even a cursory reading of this Act, that the Court of Appeals erred in stating that this Act

" makes them " (referring, of course, to the journals of 1903 *theretofore published*) " or copies thereof competent evidence when certified by the respective Clerks of the Senate and Assembly."

The Act differentiates between journals of proceedings "*heretofore published*" and journals of proceedings "*hereafter published.*"

The Act declares :

> "The journals of proceedings *heretofore published* shall be deemed for all purposes to be the original journals of the proceedings."

It is only as to the "journal of proceedings *hereafter published*" that the Act provides that—

> "the same, or a copy certified by the Clerk, may be read in evidence."

It therefore necessarily follows that in the language of the Court of Appeals there is a "failure of any original record" of the exhibits in evidence, Comptroller's Exhibit 2 (*Record*, pp. 61–62) and Comptroller's Exhibit 3 (*Record*, pp. 62–63) : for as to the journals of 1903, "heretofore published," the act does not provide that "the same, or a copy certified by the Clerk, may be read in evidence."

It is apparent, therefore, that the text of the decision of the Court of Appeals does not conform to the text of the act which it relied upon.

Doubtless, the Act was framed after the argument for the purpose of "setting at rest" our objection made on the argument to "the failure of any original record", but its text shows that this purpose ought to fail, even though the Court of Appeals has erroneously made use of the Act in its decision according to the unexpressed but manifest intent of its framers.

This Act ought to be disregarded as were the so-called "amended certificates" of the Ex-Presiding Officers of the Senate and Assembly of 1903, which were made in June, 1904, and are to be found in the *Record* at pp. 56 and 57.

The only part of the Act which could bear by a proper interpretation in any way whatever upon the journals of 1903 reads as follows :

> "The journals of proceedings of each house, *heretofore* published and now in the custody of its clerk, *shall be deemed* for all purposes to be the original journals of the proceedings of such house".

The words "shall be deemed," if standing alone, would seem to indicate a prospective law; the Court of Appeals' decision has construed the words of the act "shall be deemed *for all purposes*" as having a retroactive effect.

The tax in question being a death tax, the rights of the plaintiffs in error are to be determined by the law as it stood on December 21, 1903, the date of the death of the testator.

The word "deem" is defined in Webster's Dictionary as follows:

> "DEEM. *v. t.* To account; to esteem; to think; to judge; to hold in opinion; to regard"
> (*Webster's Unabridged Dictionary*, p. 344.)

The Court of Appeals in its decision seems to have treated the words "shall be deemed *for all purposes*" as a mandate from the Legislature which made it unnecessary for it to express its own opinion on the law of the case, and justified it in solving its doubts in accordance with the opinion and judgment of the Legislature.

We submit that there is no legislative power to direct the judiciary what it shall deem to be the law in any case: or to direct the judiciary in this case to "deem" the unauthenticated printed books now in the custody of the Clerks to be the original journals.

The Court of Appeals had itself inspected the unauthenticated printed books called "original journals" on the argument, and from this inspection it must have been manifest to the Court that they were not the original journals of the proceedings

of either House. Is it possible that an act of the Legislature, subsequently passed, declaring that the journals heretofore published "shall be deemed for all purposes to be the original journals of the proceedings of such house" would justify any Court which had itself inspected these books in holding that these unauthenticated printed books were, in law, "original journals", although, in fact, no one could deem them to be so?

The Legislature cannot compel Courts to decide that things which are not, are; or that things which are, are not.

In the absence of any authenticated journals, the so-called extracts by the Clerks which were received in evidence, were not competent evidence for any purpose.

The decision is a sentence by legislative enactment and not by the judgment of the Court of Appeals.

IV.

The legislation as construed, used and applied by the Court of Appeals to this case, is not due process of law.

In considering whether the State has not deprived the plaintiffs in error of property without due process of law, we contend that the passage by the Legislature, with the approval of the Governor, of Chapter 240 of the Laws of 1906 and the use made of this Act by the Court of Appeals, involved the legislative, executive and judicial Departments of the State of New York.

The foundation upon which all death taxes have been sustained is that the Legislature has the power to restrict the transmission of the property of a deced-

ent and so to curtail the transmission of so much of his estate as the State may see fit to appropriate for its own use, as a succession tax.

United States v. Perkins, 163 U. S., 625.
Knowlton v. Moore, 178 U. S., 41–56.
Cahen v. Brewster, 203 U. S., 543–550.

The law of 1903 and the proceedings thereunder did not effectually divest the plaintiffs in error of the $6,678.85 assessed as a tax on Mr. Stickney's real property and the law of 1906 could not retroactively accomplish such divesting as of the date of his death, December 21, 1903.

The Courts of New York, in considering certain legislation for which retroactive effect was claimed, have decided as follows:

EARL, Commissioner:

"If the effect claimed be given to the act, it makes a binding contract between the parties, where no contract previously existed, and, in effect, takes $200 of the defendant's property and transfers it to the plaintiff, a private corporation. This no act of the legislature could do. It can never take the private property of one individual, without his consent, and give it to another. (*Matter of Albany Street*, 11 Wend., 148; *Matter of John and Cherry Streets*, 19 *id.*, 649; *Taylor v. Porter*, 4 Hill, 140; *Varick v. Smith*, 5 Paige, 137; *Cochrane v. Van Surlay*, 20 Wend., 365; *Embury v. Connor*, 3 N. Y., 511.) Such an act comes in direct conflict with the constitutional provision that 'no person shall be deprived of life, liberty or property without due process of law.'"

N. Y. & Oswego M. RR. Co. v. Van Horn, 57 N. Y., 473, at p. 477.

To similar effect is the language of RUGER, Ch. J., in delivering the opinion of the Court of Appeals:

"This language looks plainly to prospective cases arising under the act, and those only, and there is nothing in the body of the act to show that the legislature intended it to apply to a dissolution already accomplished." (p. 59)

* * * * * *

"In *New York and Oswego Midland Railroad Company* v. *Van Horn* (57 N. Y. 473), it was held that a legislative intent to violate the Constitution will not be assumed, nor will a law be so construed as to give it a retroactive effect when it is capable of any other construction; and that if all of its language can be satisfied by giving it prospective operation only, that construction will be given to it.

In the case of *Dash* v. *Van Kleeck (supra)*, it was decided that it is a principle of universal jurisprudence that laws, civil and criminal, must be prospective, and cannot have a retroactive effect; and in *Benton* v. *Wickwire* (54 N. Y. 229), the court declared that neither original statutes nor amendments can have any retroactive effect unless, in exceptional cases, the legislature so declare. (*People* v. *Supervisors*, 43 N. Y., 130; *People* v. *McCall*, 94 *id.* 587; *N. Y. & O. M. R. R. Co.* v. *Van Horn*, 57 *id.* 473.)" (p. 60.)

People v. *O'Brien et al.*, 111 N. Y., p. 1, at pp. 59, 60, 61.

Chapter 240 of the Laws of 1906 by its very terms as in the case last cited, looks plainly to prospective cases.

The rule against giving a retroactive effect to legislation, as stated in the last two quotations, has been recognized and sustained in the cases cited below:

Murray v. *Gibson*, 15 How. (U. S.) 421, at pp. 423–4.

Chew Heong v. *United States*, 112 U. S., 536, at p. 559.

The People v. *Supervisors of Columbia Co.* 43 N. Y. 130, at p. 134.

Sherrill County Treasurer v. *Christ Church*, 121 N. Y. 701, at p. 703.
Matter of Delaware & Hudson Co., 129 N. Y. 105 at p. 112.
Walker v. *Walker*, 155 N. Y. 77, at p. 81.
G. & W. Ry. Co. v. *N. Y. C. & H. R. R. Co.*, 163 N. Y. 228, at p. 232.
City of Yonkers v. *N. Y. C. & H. R. R. Co.*, 165 N. Y. 142, at p. 145.
Stone v. *Board of Supervisors*, 166 N. Y. 85, at p. 91.
Metcalfe v. *Union Trust Co.*, 87 App. Div. 144, at p. 146; affd. 181 N. Y., 39.

The very nature of this tax forbids the idea that any legislation in 1906, necessary to validate a death tax act passed in 1903, can be retroactive, or can be sustained without violating constitutional provisions and principles of universal jurisprudence.

Nor will this Court be deceived by the mere phraseology in which this Act has been couched.

In

Postal-Telegraph-Cable Co. v. *Taylor*, 192 U. S., p. 64,

the Headnote reads as follows:

> "Courts are not to be deceived by the mere phraseology in which an ordinance may be couched when it appears conclusively that it was passed for an unlawful purpose and not for the one stated therein.
>
> A license fee cannot be imposed by ordinance of a municipality for purposes of inspection on telegraph companies doing an interstate business which is so far in excess of the expenses of inspection that it is plain that it was adopted, not to repay such expenses, but as a means for raising revenue."

We contend that the right not to be deprived of property except by due process of law is as much shielded by the Constitution from attack by legislative sentence as is the obligation of a contract.

While this Court has recognized that the Legislature has some control over the rules of evidence and that changes in rules of evidence may be made to apply to past transactions involved in civil cases, yet its decisions have imposed limitations upon this legislative power. One of these limitations is that such changes must not impair the obligation of the contract.

Webb v. *Weatherhead*, 17 How. (U. S.) 576.
Ogden v. *Saunders*, 12 Wheat. (U. S.) 349.
Society v. *Wheeler*, 2 Gall. (U. S.) 105.
Tennessee v. *Sneed*, 96 U. S., 69.

Speaking of a State law which changed a remedy in the case of a contract, Mr. Justice SWAYNE said:

> "The States may change the remedy, provided no substantial right secured by the contract is impaired. Whenever such a result is produced by the act in question, to that extent it is void. The States are no more permitted to impair the efficacy of a contract in this way than to attack its vitality in any other manner. Against all assaults coming from that quarter whatever guise they may assume, the contract is shielded by the Constitution."
>
> *Walker* v. *Whitehead*, 16 Wall., p. 314, at p. 318.

The use made by the Court of Appeals of Chapter 240 of the Laws of 1906, enacted after the argument and submission of the case, is in effect to validate Chapter 41 of the Laws of 1903, and the order assessing the tax thereunder, and this without notice to the plaintiffs in error, and their motion for a re-argument and for a hearing on the effect and validity of Chapter 240 of the Laws of 1906 seeking to present the views now submitted to this Court, to the Court of Appeals, has been denied.

Is this "due process of law"?

We contend that Chapter 41 of the Laws of 1903, being a death tax, the question whether it ever had the

effect of law must be determined by the law of the State as it existed at the time of the death of the owner of the property, and that no legislation after his death could give validity to that Act or to any order fixing a tax under said Act.

The decision of the Court of Appeals considers our contention "that the authenticity of the journals of the Legislature * * * was not established, and that *with the failure of any original record* certified extracts therefrom were not competent," and "without expressing any opinion on this objection," overrules it *solely on the ground* "that the question has now been set at rest by the enactment, since the argument of the appeal, of Chapter 240 of the Laws of 1906."

The Court of Appeals has thus construed Chapter 240 of the Laws of 1906 as retroactive in its effect.

If this construction should be approved by this Court, we contend that the *act itself* is unconstitutional because in effect it takes $6,678.85 of the property of the plaintiffs in error and transfers it to the State.

If this construction should be disapproved by this Court, we contend that the decision of the Court of Appeals is unconstitutional, because in effect it takes $6,678.85 of the property of the plaintiffs in error and transfers it to the State of New York.

In presenting these views to the Court, we are not unmindful of the rule stated by Mr. Justice DANIELS more than fifty years ago in delivering the opining of the Court, in the case of *Murray v. Gibson* (15 How. U. S. Rep., p. 421, at p. 425) and reading as follows:

> "It is the practice of this Court to adopt the interpretation given by the highest tribunals of the several states to their respective acts of legislation where such interpretation does not conflict with the paramount authority of the Constitution, or laws of the United States binding upon their own courts, or with the fundamental principles of justice and common right."

We contend that the effect and application given to the Act of 1906 by the Court of Appeals results in an interference with and deprivation of vested rights which is in conflict with the Constitution and with the fundamental principles of justice and common right.

The questions we ask this Court to decide are these :

Does not the actual construction and practical application of this act in this decision by the Court of Appeals give a retroactive effect and operation to Chapter 240 of the laws of 1906, which is violative of constitutional rights ?

Has not such construction and application deprived the plaintiffs in error of property without due process of law ?

We respectfully submit that both these questions should be answered in the affirmative.

V.

This Court has Jurisdiction.

The plaintiffs in error insisted upon their constitutional rights "*as soon as the occasion arose.*"

This language is taken from the syllabus of a case in which Mr. Justice HOLMES in delivering the opinion of the Court, wrote as follows :

> "There is a motion to dismiss. It is said that the Federal question was not set up in the court below, and that the court put its decision on two distinct grounds, one of which was that the Society was estopped to deny the children's title. The latter ground, it is said, was independent of the Federal question. But the opinion of the court deals expressly with the constitutional rights of the Savings Society, and the Society seems to

have insisted on those rights *as soon as the divorce was attacked. Tullock v. Mulvane*, 184 U. S., 497, 503, 504. As to the other point, it is at least doubtful whether the court meant to find any estoppel except on the footing that the property was shown to be community property. The motion to dismiss is overruled. See *Johnson v. Risk*, 137 U. S. 300, 307."

German Savings & Loan Society v. Dormitzer, 192 U. S., p. 125, at p. 127.

On March 5, 1906, the appeal to the Court of Appeals was argued and submitted.

The following is a copy of Chapter 240 of the Laws of 1906 :

" CHAP. 240.

AN ACT TO AMEND THE LEGISLATIVE LAW RELATIVE TO LEGISLATIVE JOURNALS.

Became a Law April 16, 1906, with the Approval of the Governor. Passed, Three-fifths Being Present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows :

SECTION 1. Section twenty-two of chapter six hundred and eighty-two of the laws of eighteen hundred and ninety-two entitled "An Act in relation to legislation, constituting chapter eight of the general laws," is hereby amended so as to read as follows :

§ 22. CUSTODY OF LEGISLATIVE PAPERS AND DOCUMENTS.—The Clerk of each house shall take charge of and keep on file all documents of such house, and those presented to it ; and shall cause all papers in his charge to be so classified and arranged that they can be easily found. No paper shall be withdrawn from the files of either house,

whether the same be in charge of the regents of the university or the clerk of such house, except that such clerk, or a deputy appointed by him, shall have access to the papers of such house in charge of the regents for the purpose of taking copies. Any person may obtain a certified copy of any paper or document on such files by applying to the clerk in charge thereof and paying to such clerk the same fees as are charged by law by the secretary of state for engrossing and certifying exemplifications of records deposited in his office. Either house may, by resolution, order title deeds or original documents accompanying any petition to be delivered to the person entitled thereto. The journals of proceedings of each house, heretofore published and now in the custody of its clerk, shall be deemed for all purposes to be the original journals of the proceedings of such house. The clerk of each house shall compare a printed volume or volumes of its journal of proceedings hereafter published under his direction from the original manuscript copy thereof, and having noted in such printed volume or volumes each error contained therein, shall attach thereto a certificate, under his hand and official seal, that each such printed volume or volumes was published under his direction and that as corrected, it is a correct transcript of the text of such original manuscript copy. He shall thereupon deposit and keep such printed volume or volumes, so corrected and certified, in his custody, and the same shall thereupon become and be deemed for all purposes to be the original journal or journals of proceedings of such house; and the same, or a copy certified by the clerk, may be read in evidence. The manuscript copy of the journal prepared by the journal clerk shall be kept continuously in the custody of the clerk until the printed journal shall have been published, compared, corrected and certified in the form and manner provided herein. The clerk shall cause a

duplicate or typewritten copy of said manuscript copy of each day's journal to be prepared and furnished to the printer for his use in printing the published journal.

§ 2. This act shall take effect immediately,"

Laws of N. Y., 1906, Vol. 1, pp. 471-2.

This is the first and only statutory provision of the State of New York in regard to the journals of the two Houses of the Legislature.

Under that part of Rule VII. of the Court of Appeals reading as follows:

> " If the appellant desires to present points or authorities in reply, he shall file with the clerk sixteen printed copies thereof and serve three printed copies on the attorney or counsel for the respondent, within five days after receipt of the respondent's points; *and no supplemental points will be allowed from either side unless specially requested by the Court.*"
>
> Court Rules, Official Edition, Smith-Hun, Annotated, 1906, at p. 51.

and under the practice of the Court, it was not possible for the plaintiff in error to obtain a hearing before the Court of Appeals on the validity and effect of Chapter 240 of the Laws of 1906 " unless specially requested by the Court."

1906, April 19. As appears by the brief of appellants on motion for re-argument and for a hearing on the validity and effect of Chapter 240 of the Laws of 1906, a letter on behalf of the appellants was addressed on this day, only three days after the Act became a law, to the Court of Appeals requesting that

> " In case your Honorable Court should consider that it (the Act) has any bearing whatever on the question which has been already argued and submitted, your Honors should order a re-argu-

ment or direct the filing of briefs on the validity and effect of Chapter 240 of the Laws of 1906" (p. 97).

On May 1, 1906, the decision of the Court of Appeals was delivered.

We deemed that prior to the decision of the Court of Appeals on May 1, 1906, there was no Federal question involved in this case; but after we had received a copy of the decision of the Court of Appeals we deemed that the application made by the Court of Chapter 240 of the Laws of 1906, which became a law more than three years after the passage of Chapter 41 of the Laws of 1903, and more than two years after the death of Joseph Stickney, the testator, and more than one year and a half after the trial and our objections and exceptions; and the use made of it by that Court, in validating Chapter 41 of the Laws of 1903 and of the order fixing the death tax, did raise a Federal question, and that the attention of the Court of Appeals should be drawn to this question by a motion, this being the only way left to bring the question before the Court after a decision by the Court based exclusively upon a statute enacted after the argument and submission of the case to the Court; and if our motion were denied, that the case should be presented to this Honorable Court.

Accordingly, on May 26, 1906, the plaintiffs in error moved the Court of Appeals—

I. For an order requesting the return to that Court of the remittitur, and thereupon

II. For an order *(a)* granting a re-argument of the appeal of the appellants in the above-entitled matter, and *(b)* for a hearing on the validity and effect of Chapter 240 of the Laws of 1906, on the following grounds:

"1. The appellants have not been heard and have had no opportunity to be heard in regard to validity, proper construction and the legal effect

of Chapter 240 af the Laws of 1906. Although, after the oral argument, a letter on behalf of the appellants was addressed on April 19, 1906, to the Court requesting that: 'In case your Hon-'orable Court should consider that it (the Act) 'has any bearing whatever on the question which 'has been already argued and submitted, your 'Honors should order a re-argument or direct the 'filing of briefs on the validity and effect of 'Chapter 240 of the Laws of 1906', such application was not formal and hence probably not ruled upon by the Court.

"2. We do not need to challenge the validity and effect of Chapter 240 of the Laws of 1906 so far as the same may apply to legal proceedings instituted after the date of that act. We strenuously contend that the effect which has been given to it by this Court in the present proceeding is opposed to all those principles of jurisprudence which have been universally recognized as sound and would sanction an oppressive and dangerous precedent.

"3. *The effect given by this Court to Chapter 240 of the Laws of 1906 is the same as if the Legislature of 1906 had passed a law enacting that Chapter 41 of the Laws of 1903 should be deemed for all purposes to have been passed in the presence of a quorum of three-fifths and that all proceedings theretofore taken under Chapter 41 of the Laws of 1903 should be confirmed as legal and valid assessments without any further notice to the appellants, or other persons, against whom taxes had been assessed thereunder, and as if this Court had construed and decided such a law to be constitutional and valid for the purpose of taking the property of the taxpayer for the payment of the tax. The constitutional right of the citizen, under this form of assessment and taxation is to have due notice under a law validly passed, and in effect at the date of instituting proceedings thereunder, and no*

legislation by retroactive enactments should be permitted to deprive any citizen of this right. The effect given by this Court to the Act of 1906 is to permit the respondent to avail himself of new legislation, which by its terms is only prospective, but yet is now construed and decided to apply to and bind parties in proceedings long since concluded below; and to validate a tax imposed without any legal evidence in existence, at the time the proceedings below were instituted, heard and determined, that Chapter 41 of the Laws of 1903 had the effect of a valid law at such time.

"4. In Conclusion, appellants respectfully pray that this Honorable Court will grant a reargument of the present appeal and afford an opportunity to be heard on the contention that said Chapter 240 of the Laws of 1906 does not apply to the proceedings pending in this Court, according to the settled rules of statutory construction; and that if construed to have any such retroactive effect, it would be in violation of the Constitution of the State of New York and of the Fourteenth Article of Amendments to the Constitution of the United States in that it would impose and exact a tax and the State would deprive the appellants of property without due notice and without due process of law. Obviously, the appellants have never had any day in Court to be heard upon the validity and effect of this legislation enacted after the oral argument and submission of the case; and justice, it is earnestly submitted, requires that they should be afforded such a hearing before their rights are finally concluded" (pp. 95-96-97-98).

The italicized portions of these grounds for a reargument and for a hearing on the validity and effect of Chapter 240 of the Laws of 1906, show clearly, that as soon as the occasion arose the plaintiffs in error specially set up and claimed their rights, privileges and im-

munities under the Fourteenth Article of Amendments to the Constitution of the United States.

It appears in the *Record* from the certificate of the Clerk of the Court of Appeals that the foregoing motion on the foregoing papers "was made and submitted to the Court of Appeals on June 4, 1906, that said motion was denied with $10. costs on June 12, 1906, and that no opinion was delivered on the decision of the motion" (p. 94).

The Court of Appeals in denying this motion has adhered to its decision on the main case to the effect that our objections must be overruled solely on the ground "that the question has now been set at rest, by the enactment, since the argument of the appeal, of Chapter 240 of the Laws of 1906," and as stated in our Assignment of Errors, has

> "in effect, held:
>
> (*a*) that Chapter 240 of the Laws of 1906 should be construed to have a retroactive effect, and
>
> (*b*) that such construction would not be in violation of the Fourteenth Article of the Amendments to the Constitution of the United States, and
>
> (*c*) would not impose and exact a tax without due notice and without due process of law, and
>
> (*d*) that the state would not by such act and such construction thereof deprive the plaintiffs in error of property without due notice and without due process of law; each of these grounds having been stated in the notice of said motion by the plaintiffs in error who then and there insisted upon their constitutional rights in such respects as soon as the occasion arose". (p. 110.)

Mr. Justice HOLMES in delivering the Opinion of the Court in the following case, says:

> "The case then stands thus: The state court has sustained a result which cannot be reached,

except on what we deem a wrong construction of the charter, without relying on unconstitutional legislation. It clearly did rely upon that legislation to some extent, but exactly how far is left obscure. We are of opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the state court put forward the untenable construction more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this court. *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 697. We may add that it is admitted that one of the acts of 1897 was necessary to authorize a demand and so to create a cause of action. It was for want of an authorized demand that the former suit was held no bar. But in our opinion the State had no right in 1897 to make a demand."

Terre Haute &c. Railroad Co. v. Indiana, 194 U. S., p. 579, at p. 589.

The case at bar differs from *McMillan* v. *Ferum Mining Co.* (197 U. S., 343), by reason of the fact that the federal question in the case at bar arose only after the argument and final submission of the case to the Court of Appeals, after the passage of Chapter 240 of the Laws of 1906 and after the decision of the Court of Appeals relying on this unconstitutional application of legislation, and that there was no power by which the Court of Appeals could have been compelled to express any opinion on our motion for a hearing on the validity and effect of this Act, which motion was made as soon as the federal question was imported into the case by the decision of the Court of Appeals.

Unlike the record in the case of *French* v. *Taylor* (199 U. S. R., p. 274), the record in the case at bar contains the petition for a rehearing raising Federal questions and also a certificate of the Clerk of the Court of Appeals that the motion for a rehearing was

submitted and denied although without any opinion, and as Mr. Chief Justice FULLER in deciding the case above cited said at page 278 :

> " though if the Supreme Court had considered and decided such Federal question we could take jurisdiction,"

we respectfully submit that this Court has jurisdiction over the Federal question raised in our motion for a rehearing and denied by the Court of Appeals.

VI.

The order of the Surrogate's Court of the County of New York made and entered herein on the eleventh day of November, 1904, should be modified by omitting therefrom the tax on $667,884.50 of real property, assessed therein at $6,678.85 and the cause should be remanded to the Surrogate's Court of New York County for further proceedings in accordance with the determination of this Honorable Court.

EDWARD MITCHELL,
Counsel for Plaintiffs in Error.

Office Supreme Court, U. S.
FILED.
MAR 16 1908
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1907.

No. 196.

CAROLYN FOSTER STICKNEY, AS EXECUTRIX, AND ROBERT J. JENKS AND JOHN G. HANNAH, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF JOSEPH STICKNEY, DECEASED, AND CAROLYN FOSTER STICKNEY, INDIVIDUALLY AND AS WIDOW AND DEVISEE,

Plaintiffs in Error,

vs.

OTTO KELSEY, COMPTROLLER OF THE STATE OF NEW YORK,

Defendant in Error.

IN ERROR TO THE SURROGATE'S COURT IN AND FOR THE COUNTY OF NEW YORK, STATE OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR

DAVID B. HILL,

Counsel for Defendant in Error.

Supreme Court of the United States.

CAROLYN FOSTER STICKNEY, as Executrix, and ROBERT J. JENKS and JOHN G. HANNAH, as Executors of the Last Will and Testament of JOSEPH STICKNEY, Deceased, and CAROLYN FOSTER STICKNEY, Individually and as Widow and Devisee,

Plaintiffs in Error,

against

OTTO KELSEY, Comptroller of the State of New York,

Defendant in Error.

October Term, 1907.

No. 196.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This case arises on writ of error to the Surrogate's Court of the county of New York, in the State of New York, to review the determination of the Court of Appeals of the State of New York unanimously affirming an order of the Appellate Division of the Supreme Court in the First Department unanimously affirming an order of said Surrogate's Court imposing a tax upon the transfer of certain real property belonging to Joseph Stickney, deceased, at the time of his death, which by the terms of his will was devised to his widow. The case, as reported in the Court of Appeals, will be found in 185 N. Y., 107.

Joseph Stickney, the testator, died on the 21st day of December, 1903, seized of certain real estate

in the State of New York, which was, by his will, devised to his wife (pp. 14-18) who survived him.

Prior to the death of said testator, the Legislature of the State of New York had passed chapter 41 of the Laws of 1903, which took effect March 16, 1903, and which act amended section 221 of the Tax Law of said State so that it read as follows:

> "§ 221. Exceptions and limitations.—When property, real or personal or any beneficial interest therein, of the value of less than ten thousand dollars, passes by any such transfer to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of a son or the husband of a daughter * * * such transfer of property shall not be taxable under this act; if real or personal property, or any beneficial interest therein, so transferred is of the value of ten thousand dollars or more, it shall be taxable under this act at the rate of one per centum upon the clear market value of such property." * * *

There is no question involved herein as to the amount of the tax or as to the parties who may be liable therefor, in case the statute is valid.

The principal question presented in the State courts was whether the said amendatory act of 1903 was passed in accordance with the Constitution of the State of New York.

It was conceded that the amendatory act received the votes of a majority of each branch of the Legislature, but it was claimed in the courts below by the plaintiffs in error that three-fifths of such membership were not shown, by competent evidence, to have been present at the time of such passage and as required by section 25 of article 3 of the said Constitution.

Said section 25 of article 3 is as follows:

> "§ 25. On the final passage, in either house of the legislature, of any act which imposes,

continues or revives a tax, or creates a debt or charge, or makes, continues or revives any appropriation of public or trust money or property, or releases, discharges or commutes any claim or demand of the state, the question shall be taken by yeas and nays, which shall be duly entered on the journals, and three-fifths of all the members elected to either house shall in all such cases, be necessary to constitute a quorum therein."

Sections 40 and 44 of the Legislative Law (Laws of 1892, chap. 682, as amended by Laws of 1894, chap. 53) provide as follows:

"§ 40. *Certificate of presiding officer.*— Upon the passage of a bill or concurrent resolution by either house, the presiding officer thereof shall append to such bill or resolution, a certificate of the date of its passage by the votes of a majority of all the members elected to such house or in the presence of three-fifths of such members, if such be the case, or by the votes of two-thirds of all the members elected to such house, as the case may be. No bills shall be deemed to have so passed unless certified by the presiding officer, which certificate to such effect shall be conclusive evidence thereof."

"§ 44. *Statement in session laws as to passage of law.*— In the *publication* of every law, the Secretary of State shall omit the certificates appended thereto, but shall cause to be inserted immediately under the title of the law, a statement to the effect that it became a law upon the properly specified date, with or without the approval of the Governor, or notwithstanding his objections, as the case may be, and adding the words "passed by a two-thirds vote," "passed, three-fifths being present," or "passed, a majority being present," in accordance with the certificates appended to the original bill. Such statement shall be presumptive evidence that the original law was certified by the presiding officer of each house accordingly."

It seems that either through inadvertence or otherwise there had been attached to the original bill (chap. 41, Laws 1903) on file in the office of the Secretary of State, erroneous or imperfect certificates of the presiding officers of the Senate and Assembly which read as follows:

"IN SENATE.

STATE OF NEW YORK,
Feb. 26, 1903.

This bill was duly passed, a majority of all the Senators elected voting in favor thereof. By order of the Senate.

FRANK W. HIGGINS,
President."

"IN ASSEMBLY.

STATE OF NEW YORK,
Mar. 11, 1903.

This bill was duly passed, a majority of all the members elected to the Assembly voting in favor thereof. By order of the Assembly.

S. F. NIXON,
Speaker."

In the New York Session Laws of 1903 (vol. 1, page 165), chapter 41, is entitled as follows: "An act to amend the tax law relating to exceptions and limitations in the taxation of taxable transfers." And immediately under said title is the following: "Became a law March 16, 1903, with the approval of the Governor. Passed, a majority being present."

Afterwards, for the purpose of correcting the error aforesaid, an amended certificate was made both by the President of the Senate and the Speaker

of the Assembly and filed in the office of the Secretary of State, in which the words " three-fifths being present " were added.

An appraiser was afterwards duly appointed to appraise the value of decedent's estate, which was subject to taxation, by an order of the Surrogate's Court of the county of New York, on the 14th day of April, 1904. (Record, page 2.)

On the hearing before said appraiser, the counsel for the defendant in error (the State Comptroller) offered in evidence a certified copy of chapter 41 of the Laws of 1903, as filed in the office of the Secretary of State; also certified copies of the original certificates of the presiding officers of the Senate and Assembly as originally attached to said bill on file in the said Secretary of State's office; also certified copies of *amended* certificates of the presiding officers of the Senate and Assembly, as attached to said bill on file in the Secretary of State's office; also certified copies of the affidavits of each of the presiding officers of the Senate and Assembly, giving their reasons for filing such amended certificates. (Record, page 37.)

Thereupon the counsel for the plaintiffs in error objected to receiving any part of the paper respecting chapter 41 of the Laws of 1903, except the certificates of the presiding officers of the Senate and Assembly *originally* affixed thereto. He further objected to the amended certificates of the Speaker of the Assembly made in 1904, because he had ceased to be such Speaker prior to January 1, 1904, and he further objected that neither of such amended certificates were authorized by any law; and such objections were further amplified. (Record, pages 37, 38.)

The appraiser overruled such objections and the papers were received in evidence. (Record, page 38.)

Thereupon counsel for plaintiff in error offered in evidence a certified copy made by the Secretary of State, dated April 12, 1904, of chapter 41 of the Laws of 1903, and the certificates of the President of the Senate and of the Speaker of the Assembly which are appended to the original act then on file in the office of the Secretary of State, which was received in evidence and marked "Executor's Exhibit A." (Record, pages 38, 66, 67, 68.)

Thereupon counsel for the Comptroller further offered in evidence a certified copy of an extract from the *Senate Journal* of Thursday, February 26, 1903, showing that chapter 41 of the Laws of 1903, was passed, three-fifths of the members elected to the Senate being present and their names being set forth; and also offered in evidence a like certified copy of an extract from the *Assembly Journal* of Wednesday, March 11, 1903, on final passage of chapter 41 of the Laws of 1903, showing that three-fifths of all the members elected to the Assembly were present on that occasion and their names being set forth. Which evidence was objected to by counsel for the plaintiffs in error on the ground that the papers offered were incompetent, irrelevant and immaterial; that the original journals, if produced, are not records either at common law or by statute, and cannot be resorted to by the court, for the purpose either of validating or impeaching any law, and that the Legislative Law makes the certificates of the presiding officers conclusive evidence as to whether the majority were present or three-fifths, and that the conclusive evidence is that there was only a majority present and not three-fifths. (Record, pages 38, 39.)

The certificates were received in evidence, marked Comptroller's Exhibits 2 and 3, and appear in the record pages 61, 62; and after receiving some other evidence (unnecessary to be here stated) the hearing closed.

The appraiser thereafter made his report to the said Surrogate's Court showing his appraisement of the value of said real property owned by decedent at the time of his death and assessed the tax thereon. (Record, pages 40, 55.)

On November 11, 1904, an order was entered in said Surrogate's Court fixing a tax upon the transfer of said real property against said decedent's widow at the rate of one per centum. (Record, pages 68, 70.)

An appeal was taken from said order to the surrogate (Record, pages 70-74) and the surrogate handed down an opinion affirming said order fixing a tax upon said real property, and an order was thereafter and on the 7th day of July, 1905, duly entered in said Surrogate's Court affirming said order. (Record, page 80.) An appeal was taken from said last-mentioned order to the Appellate Division of the Supreme Court, First Department (Record, page 81), and the Appellate Division, in an opinion by Mr. Justice Laughlin (Record, pages 82-88), unanimously affirmed said order and an order of affirmance thereof was duly entered. (Record, page 88.)

An appeal was taken by plaintiffs in error here from the order of the Appellate Division to the Court of Appeals. (Record, page 89.)

The Court of Appeals unanimously affirmed the order of the Appellate Division and of the surrogate. (Record, pages 90, 92.)

The plaintiffs in error here then made a motion before the Court of Appeals for a reargument of said appeal, which motion was denied (Record, page 93), *Matter of Stickney* (185 N. Y., 597), and it is from the order of affirmance and the order denying the motion for a reargument that this appeal or writ of error is taken.

The question presented upon the appeal to the Court of Appeals of the State of New York was whether chapter 41 of the Laws of 1903 was constitutionally enacted.

This question is also presented upon the writ of error to this court, and also as to the right of the Court of Appeals to deny the motion made for a reargument of said appeal.

No question is raised as to the right of the Legislature of the State of New York to pass the law in question.

FIRST POINT.

The Amendatory Act of 1903 was constitutionally enacted, and the evidence produced before the Surrogate satisfactorily established that fact.

(The surrogate, as well as the Appellate Division, having held that the *amended* certificates of the presiding officers of the two houses were not competent evidence to correct the erroneous or imperfect certificates attached to the original bill (Record, pages 80, 85), we do not press the point further as to the competency of such *amended* ones.)

We, however, insist that recourse was properly had to the journals of the two houses to show that, in fact, there was three-fifths of the legislative bodies present when the bill was passed by a majority vote.

The Constitution (art. 3, § 11) requires that "Each house *shall keep* a journal of its proceedings," while section 15 of said article requires that the yeas and nays shall be entered on the journal. The evident purpose of these constitutional provis-

ions was that there should always be a record by which to ultimately determine whether a bill has been constitutionally passed, in case the fact shall be disputed. The journals of the respective houses are the highest and best evidence prescribed by the Constitution to establish the due passage of bills. For that purpose the responses of the legislators by yeas and nays must be entered on the journals; and the evidence of the journals must control over the certificates of the presiding officers in case of a conflict between them.

The certificates of the presiding officers must necessarily be based upon the information derived from the journals. The presiding officers are not required to keep a tally of the votes given, and their only information as to what vote a bill receives must come from an inspection of the journals or verbal information from the clerks of their respective houses.

The journals of the respective houses are the original entries and records from which the certificates of the presiding officers are made up.

(*a*)

Besides the journals here were received in evidence, not in contradiction of the certificates of the presiding officers of the two houses, but as supplementary thereto and *in aid thereof*.

Each certificate declared that "This bill was *duly* passed," the Senate certificate adding "a majority of all the Senators elected voting in favor thereof;" and the Assembly certificate adding "a majority of all the members elected to the Assembly voting in favor thereof." (Record, page 67.)

The journals were not introduced to show that the bill was not "duly passed;" not to contradict the certificates as to the bill having been "duly

passed," but to corroborate them in that respect. The bill only required a majority vote in its favor, and the certificates declared that it had received such majority vote and therefore that it had been "duly passed." But the certificates were defective in that they did not show that "three-fifths" were present when a majority voted for it, as the Constitution requires the presence of such number in order to "duly pass" a bill of that character. (Const., art. 3, § 25.)

The certificates not expressly stating how many (members or Senators) were present when the bill was "duly passed," the journals simply supplied that omission. The certificates stated that a majority voted for the bill and a majority must necessarily have been present in order to so vote; but more than a majority, to wit, three-fifths may have been present when such majority voted for the bill, and there is no *contradiction* of the certificates in permitting that fact to be shown by the journals. The journals simply supply an omission in the certificates; that is all.

(*b*)

The Constitution does not provide that the certificates of the presiding officers of the two houses shall be permitted to absolutely determine the presence or absence of a necessary three-fifths quorum when bills of a certain character are passed. It provides for journals to be kept wherein the "yeas and nays" shall be entered, and presumably such journals were intended to be evidence of the presence or absence of the necessary quorum required by the Constitution.

In so far as the Legislative Law assumes to provide that the mere certificates of the presiding officers of the two houses shall be *conclusive* of the presence or absence of the quorum essential for the

passage of bills of a certain nature, to the absolute exclusion of any other species of evidence, it must be deemed to have exceeded its constitutional authority.

No mere legislative act can render ineffectual or practically valueless the provisions of the Constitution itself which were intended to provide evidence of the due enactment of certain species of legislation.

(*c*)

The certificates of the presiding officers herein being concededly defective in that they omit to state *whether or not* there was a three-fifths quorum present when the amendatory act in question was passed, it was permissible to supply the omission by the journals.

This was so held by the Court of Appeals in this case.

Matter of Stickney, 185 N. Y., 107.

And even before this decision it was settled law in the State of New York.

Matter of N. Y. & Long Island Bridge Co., 148 N. Y., 540.

Rumsey et al. v. N. Y., &c., R. R. Co., 130 N. Y., 88.

People v. Supervisors of Chenango, 8 N. Y., 317.

Purdy v. The People, 4 Hill, 384.

SECOND POINT.

The original journals being admissible in evidence to supply the defects in the certificates of the presiding officers and to show that the statute was duly passed in the presence of a constitutional quorum, it was proper to introduce certified copies thereof.

Section 933 of the Code of Civil Procedure of the State of New York provides as follows:

> "A COPY OF A PAPER FILED, kept, ENTERED OR RECORDED, PURSUANT TO LAW, IN A PUBLIC OFFICE OF THE STATE, THE OFFICER HAVING CHARGE OF WHICH HAS, PURSUANT TO LAW, AN OFFICIAL SEAL; OR WITH THE CLERK OF A COURT OF THE STATE; or with the clerk or secretary of either house of the Legislature, OR OF ANY OTHER PUBLIC BODY OR PUBLIC BOARD CREATED BY AUTHORITY OF A LAW OF THE STATE, AND HAVING, PURSUANT TO LAW, A SEAL; OR A transcript FROM A record kept, pursuant to law, IN SUCH A PUBLIC OFFICE, or by such a clerk or secretary, is evidence, as if the original was produced. BUT TO ENTITLE IT TO BE USED IN EVIDENCE, IT MUST BE CERTIFIED BY THE CLERK OF THE COURT, UNDER HIS HAND AND THE SEAL OF THE COURT; OR BY THE OFFICER HAVING THE CUSTODY OF THE ORIGINAL OR HIS DEPUTY, OR CLERK, APPOINTED PURSUANT TO LAW, UNDER HIS OFFICIAL SEAL, AND THE HAND OF THE PERSON CERTIFYING; OR BY THE PRESIDING OFFICER, secretary or clerk of the public body OR BOARD, APPOINTED PURSUANT TO LAW, UNDER HIS HAND, AND, EXCEPT WHERE IT IS CERTIFIED BY THE clerk or secretary of either house of the Legislature, UNDER THE OFFICIAL SEAL OF THE BODY OR BOARD."

(The foregoing section, in its present form, has been in force in the State of New York ever since 1879. (See chap. 542 of the Laws of 1879.)

This section makes a copy of the journal of either house of the Legislature, evidence of the matters therein contained, the same as if the original was produced, when certified by the clerk of the House or Senate, and the copies offered in evidence were so certified. (Record, pages 62-64.)

It is submitted that the legal presumption was that there were original records, when the clerks of the two houses certified that the ones produced were copies.

Besides the certificate of each clerk states that he has compared the extract annexed thereto with the "original" journals and that the said extract is a correct and true copy thereof; and each certificate is also verified (although, of course, unnecessarily). No further evidence on the question of their authority could possibly be necessary.

Besides there was no objection interposed by the counsel for the plaintiffs in error here, that the original record was not produced or that there was none, or that there was any defect in form or otherwise in the certification of the copies, but his objection was simply the general or "standard" one that the evidence was "incompetent, irrelevant and immaterial," and further that the original journals, *if produced,* would not be admissible. (Record, pages 38, 39.) Hence no other objection or any specific objection which might have been obviated can now be raised.

WE REITERATE THAT THE CLERKS' CERTIFICATES OF TRANSCRIPTS FROM THE JOURNALS OF 1903, SHOWING THE DUE ENACTMENT OF THE STATUTE OF 1903, WERE PROPERLY ADMITTED IN EVIDENCE UNDER THE CODE PROVISION AFORESAID.

THE REFERENCE BY THE COURT OF APPEALS TO THE ALLEGED RETROACTIVE ACT OF 1906 MAY BE DISREGARDED AS UNNECESSARY TO THE DECISION ACTUALLY MADE, AND AS HARMLESS.

(*a*)

As the Constitution of New York requires that "each house shall keep a journal of its proceedings," it necessarily follows that such journals are public "papers" or "records" within the meaning of the various statutes relating to certified copies of papers and records "kept pursuant to law."

As section 933 of the Code of Civil Procedure of New York expressly includes the clerks or secretaries of either house of the Legislature among those who may make certified copies of "records" and "papers," it is clear that such certified copies are and were admissible in evidence in all courts of the State to prove the acts and proceedings of such official bodies.

No other or further legislation was required to authorize the admission of certified copies of the legislative records.

The Code provision is ample for every purpose of furnishing competent evidence thereof. Besides there having been no specific objection as to the form of the certificates received in evidence no objection to mere form can now be considered.

(*b*)

Neither does the fact that the Legislature subsequently (in 1906) passed another statute relative to legislative journals and records (chap. 240 of the Laws of 1906) making further and additional provisions for the admission of certified copies thereof, cast any doubt upon their prior admissibility under the Code provision.

The latter law is as follows:

"AN ACT to amend the legislative law relative to legislative journals."

(That portion of it in italics constitutes the amendment; it became a law April 16, 1906.)

"Section 1. Section twenty-two of chapter six hundred and eighty-two of the laws of eighteen hundred and ninety-two, entitled 'An act in relation to legislation, constituting chapter eight of the general laws,' is hereby amended so as to read as follows:

§ 22. Custody of legislative papers and documents.— The clerk of each house shall take charge of and keep on file all documents of such house, and those presented to it; and shall cause all papers in his charge to be so classified and arranged that they can be easily found. No paper shall be withdrawn from the files of either house, whether the same be in charge of the regents of the university or the clerk of such house, except that such clerk, or a deputy appointed by him, shall have access to the papers of such house in charge of the regents for the purpose of taking copies. Any person may obtain a certified copy of any paper or document on such files by applying to the clerk in charge thereof and paying to such clerk the same fees as are charged by law by the secretary of state for engrossing and certifying exemplifications of records deposited in his office. Either house may, by resolution, order title deeds or original documents accompanying any petition to be delivered to the person entitled thereto. *The journals of proceedings of each house, heretofore published and now in the custody of its clerk, shall be deemed for all purposes to be the original journals of the proceedings of such house. The clerk of each house shall compare a printed volume or volumes of its journal of proceedings hereafter published under his direction from the original manuscript copy thereof, and having noted in such printed volume or volumes each error contained therein, shall attach thereto a certificate, under his hand and official seal, that each such printed volume or volumes was published*

under his direction and that, as corrected, it is a correct transcript of the text of such original manuscript copy. He shall thereupon deposit and keep such printed volume or volumes, so corrected and certified, in his custody and the same shall thereupon become and be deemed for all purposes to be the original journal or journals of proceedings of such house; and the same, or a copy certified by the clerk, may be read in evidence. The manuscript copy of the journal prepared by the journal clerk shall be kept continuously in the custody of the clerk until the printed journal shall have been published, compared, corrected and certified in the form and manner provided herein. The clerk shall cause a duplicate or typewritten copy of said manuscript copy of each day's journal to be prepared and furnished to the printer for his use in printing the published journal.

§ 2. *This act shall take effect immediately.*"

It will be observed that the foregoing amendment neither expressly nor impliedly repeals the Code provision aforesaid, but is in addition or supplementary thereto.

Both statutes provide for the certification of copies of legislative records, but the act of 1906 provides in addition for other and distinct matters, as hereinafter stated.

An analysis of the **Code provision** shows that it provides for the admission in evidence of a certified copy of a paper or record filed, entered, kept or recorded, pursuant to law, in a public office of the State where (1) the officer having charge of which has, pursuant to law, an official seal; or of a paper filed, kept, entered or recorded pursuant to law (2) with the clerk of a court of the State; or of a paper filed, kept, entered or recorded (3) *with the clerk or secretary of the Legislature,* or of *any other public body* or public board created by authority of a law of the State and having, pursuant to law, a seal; and it further provides that "*a tran-*

script from a record kept, pursuant to law, in such a public office, or by such a clerk or secretary, is evidence as if the original was produced."

The section then further provides that to entitle such copy to be used in evidence, it must be certified by the clerk or secretary of either house of the Legislature, etc.

The certificates of 1904 introduced in evidence by the defendant in error herein (Record, pages 62, 64) showing the due passage of the act of 1903, were in accordance with the Code provision.

The statute of 1906 goes further than the Code provision and provides for the correction of mistakes in legislative records, and further declares "what shall be deemed" the "original journals of the proceedings" of each house, and provides for the custody thereof; and declares that "*the same*" — to wit, such original journals — "*or a copy certified by the clerk may be read in evidence.*"

There is no conflict between the two acts; one simply goes further than the other in the matter of the correction of any errors which may have occurred in printing or publication.

The record herein does not show that there were any errors in the *journals* of either house in 1903. There was simply an error in the printed session laws of 1903 in not correctly stating the number of legislators actually present when the bill was duly passed. The journals were properly resorted to in order to correct that error; and nobody has been harmed or wronged.

THIRD POINT.

But a conclusive answer to the whole question as to whether the act of 1903 was constitutionally enacted is found in the fact that the Court of Appeals of the State of New York has determined that it was, and its decision is binding upon this court. This decision violates none of the provisions of the Federal Constitution, and until such provisions are violated no Federal question is raised.

This proposition is abundantly sustained by the authorities.

The two cases of *Town of South Ottawa v. Perkins* and *Supervisors of Kendall County v. Post*, both reported in 94 U. S., 260, are in point.

The first action was brought by Perkins to recover the amount due upon two bonds of the town of South Ottawa.

The second action was upon a bond issued by the County of Kendall.

The only authority claimed for issuing these bonds was an act of the Legislature of Illinois.

Mr. Justice Bradley, in delivering the opinion of the court, said:

> "It is insisted on the part of the plaintiffs in error in these cases that the law relied on for authority to issue the bonds in question was never passed, no entry of its passage appearing on the journal of the Senate of Illinois. * * * *And whether it be a law, or not a law, is a judicial question, to be settled and determined by the courts and judges.* * * * *It would be a very unseemly state of things, after the courts of Illinois have determined that a pretended statute of that State is not*

such, having never been constitutionally passed, for the courts of the United States, with the same evidence before them, to hold otherwise. * * * And this court has always held that the laws of the States are to receive their authoritative construction from the State courts, except where the Federal Constitution and laws are concerned; and the State Constitutions, in like manner, are to be construed as the State Courts construe them. This has been so often laid down as the proper rule, and is in itself so obviously correct, that it is unnecessary to refer to the authorities.

If, therefore, the law in question had never been passed upon by the State courts, the courts of the United States would nevertheless be bound to give to the Constitution of Illinois the same construction which the State courts give to it, and to hold a pretended act of the Legislature void and not a law which the State courts would hold to be so. * * * *As a matter of propriety and right, the decisions of the State courts on the question as to what are the laws of the State is binding upon those of the United States.*"

As to a motion made for further instructions to the court below, Mr. Justice Bradley said (page 277):

"We recognize the construction of the Constitution of Illinois adopted by the State court, to the effect that a law is void if not passed by the requisite majority, and so entered on the journal. We also hold the existence of a law to be a judicial question, to be decided by the court, though framed in form as an issue of fact."

In *Railroad Co. v. Georgia* (98 U. S., 359), Mr. Justice Strong, in delivering the opinion of the court, said:

"In regard to the position taken by the plaintiff in error, that the sections of the Code we have quoted were not laws of the State in

1863, because the Code was not read three times in each house of the General Assembly, as required by the State Constitution, *it is sufficient to say that the Supreme Court of the State has decided they were, and its decision of such a question is not open for revision by us in a case brought here from a State court.*"

In *Post v. Supervisors* (105 U. S., 667), Mr. Justice Gray, in delivering the opinion of the court, said:

> "*An act of the Legislature of a State, which has been held by its highest court not to be a statute of the State, because never passed as its Constitution requires, cannot be held by the courts of the United States, upon the same evidence, to be a law of the State.*"

In *Kennard v. Louisiana ex rel. Morgan* (92 U. S., 480), Mr. Chief Justice Waite, in delivering the opinion of the court, said:

> "The question before us is, not whether the courts below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the Constitution. *Irregularities and mere errors in the proceedings can only be corrected in the State courts. Our authority does not extend beyond an examination of the power of the courts below to proceed at all.*"

In *Morley v. Lake Shore Railway Co.* (146 U. S., 162) the question was whether a judgment duly docketed which drew interest at the rate of seven per cent was affected by the passage of a statute making the rate of interest thereafter six per cent and whether such statute is valid as to judgments docketed before its passage. Mr. Justice Shiras, in delivering the opinion of the court, said:

> "The first question we have to consider is the effect to be given to the saving clause con-

tained in the first section of the Act of June 20, 1879, which provides that nothing therein contained shall be so construed as to in any way affect any contract or obligation made before the passage of that act. *This question is answered for us by the decision of the Court of Appeals of New York in this very case, holding that this saving clause is not applicable in the case of a judgment like plaintiff's.* In *Louisiana v. Pilsbury* (105 U. S., 278, 294), this court, speaking by Mr. Justice Field, says: 'Whether such a construction (by judicial decisions upon a clause of the State Constitution) was a sound one, is not an open question. * * * The exposition given by the highest tribunal of the State must be taken as correct so far as contracts made under the act are concerned. * * * The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend, that when a statute of two States expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own State, and enforced in accordance with it in all cases arising under it. *The rule of construction adopted by the highest court of the State, in construing their own constitution, and one of their own statutes in a case not involving any question re-examinable in this court under the twenty-fifth section of the Judiciary Act, must be regarded as conclusive in this court.' (Provident Institution v. Massachusetts,* 6 Wall., 611, 630.) 'The construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text.' (*Leffingwell v. Warren,* 2 Black, 599, 603.) The meaning of a State statute, declared by the highest court of a State, is conclusive upon this court. (*Randall v. Brigham,* 7 Wall., 523, 541.) If, then, the law as enacted by the Legislature, and construed by the State judiciary, will be the law

of the State, it follows that, as to the proper construction of the statutes and as to what should be regarded as among its terms, no Federal question could arise. The most that could be claimed would be that, although the statute of the State was unobjectionable, yet the State court had erroneously construed it. This would constitute a purely judicial error, involving no question of the validity of the law; which latter question alone is, by the plainest possible terms of the Constitution and Judiciary Act, subject to investigation here. Assuming, then, that the statute in question was correctly construed by the New York court, our only inquiry must be as to the validity of the statute itself, as construed by the State court."

In *Bergemann v. Backer* (157 U. S., 655), which was an appeal from a denial of an application for a writ of *habeas corpus* after conviction for murder, Mr. Justice Harlan, in delivering the opinion of the court, said:

"It is equally clear that the refusal of the courts of New Jersey to grant the accused a writ of error or to stay the execution of the sentence passed upon him constituted no reason for interference in his behalf by a writ of *habeas corpus* issued by a court of the United States.

If an indictment in a State court, under statutes not void under the Constitution of the United States be defective, according to the essential principles of criminal procedure, an error in rendering judgment upon it—even if the accused at the trial objected to it as insufficient—should not be made the basis of jurisdiction in a court of the United States to issue a writ of *habeas corpus*. The court below having had jurisdiction of the offence and of the accused, and having proceeded under a statute not repugnant to the Constitution of the United States, the Circuit Court of the United States had no authority to interfere, by means of a writ of *habeas corpus*, with the execution

of the sentence. (*Andrews v. Swartz*, 156 U. S., 272; *New York v. Eno*, 155 U. S., 89, 98.)"

In re Duncan Petitioner (139 U. S., 449), Duncan was convicted of murder in Texas and in April, 1899, filed a petition for a writ of *habeas corpus* in the Circuit Court of the United States for the western district of Texas, on the ground that he was deprived of his liberty and about to be deprived of his life, in violation of the Constitution of the United States.

It was alleged that he was deprived of his liberty without due process of law, and denied the equal protection of the laws because the Penal Code and Code of Criminal Procedure of the State of Texas, now and since July 24, 1879, recognized as law, under which his alleged trial was conducted, were not enacted by the Legislature of the State of Texas, and that the definitions and rules in the supposed Codes were materially different from the definitions and rules of procedure prevailing before their alleged adoption.

The petition then averred that the Codes failed of enactment on these grounds in substance: That the bill which contained them was not referred to a committee and reported on in the house, and was not read on three several days in each house, as required by the State Constitution; and although the Legislature dispensed with the reading of the printed matter *in extenso*, and provided for a consideration on three several days, the bill was not so considered; that the two houses of the Legislature never agreed to or came to a common legislative intent on the passage of the bill; that neither house of the Legislature kept a journal of its proceedings as required; that an abortive attempt was made to dispense with enrollment, and there was no enrollment of the bill, or any substitute therefor; that

there is no record in existence by which the accuracy of said statutes can be verified; that the Legislature attempted to delegate legislative power to one Lyle, who proceeded to embody the alleged Codes into a printed book, the volume known as the Revised Statutes of Texas; that the said volume is not a copy of or identical with the bill said to have been passed embodying them, but is widely variant therefrom, and from the original bill on file in the office of the Secretary of State; that the alleged law set out in the Revised Statutes was never considered or passed by the Legislature of the State, nor considered by the Governor, and did not become a law; that the printing, binding, distribution and codification of the volume known as the Revised Statutes was never duly or legally authorized; and that the entire system of penal and civil laws is involved.

The sheriff filed exceptions to the jurisdiction of the Circuit Court, and assigned among other reasons that the petition showed upon its face that the matters in controversy did not arise under the Constitution, laws or treaties of the United States, nor did the adjudication or determination of the same involve a construction thereof; but that the matters arose solely under the Constitution and laws of the State of Texas, and their determination involved exclusively the construction of the State Constitution and laws.

Mr. Chief Justice Fuller, in delivering the opinion of the court, said:

> "If the question of the invalidity of the Codes was presented to the District Court of Maverick county, it must be assumed that it adjudged in favor of their validity, and as the case has been carried to the Court of Appeals, that it will there be adjudicated in accordance with the law of the State, and when so determined it is entirely clear that that adjudication could not be reviewed by the Circuit Court,

or by us, on *habeas corpus*. And the result must be the same if the question has not been raised by the petitioner in the State courts. * * *

The State of Texas is in full possession of its faculties as a member of the Union, and its legislative, executive and judicial departments are peacefully operating by the orderly and settled methods prescribed by its fundamental law. *Whether certain statutes have or have not binding force, it is for the State to determine, and that determination in itself involves no infraction of the Constitution of the United States, and raises no Federal question giving the courts of the United States jurisdiction.*"

In *Wilkes County v. Coler* (180 U. S., 506) the question was whether the county of Wilkes, North Carolina, is liable upon certain bonds issued in 1889 in payment of a subscription in its name to the capital stock of the North Western Carolina Railroad Company. The bonds were issued by the authority of an act of the General Assembly of North Carolina.

The county insists that the bonds in question were issued in violation of the 14th section, article 2, of the Constitution of the State, which is in these words: "No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three times in each house of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal."

The case was taken to this court on the following certified question:

Whether upon the averments of the bill of complaint, answers, etc., the Circuit Court was bound in passing upon this case by the decisions of the Supreme Court of North Carolina.

The court, by Mr. Justice Harlan, said at page 519:

> *"These questions have been so distinctly answered by this court in cases heretofore decided that a discussion of them upon principle is unnecessary.*
>
> In *Town of South Ottawa v. Perkins* (94 U. S., 260, 267, 268), which was an action upon municipal bonds, the question was whether any such statute ever existed as that under the authority of which the bonds there in suit purported to have been issued. * * * This court said: 'As a matter of propriety and right, the decisions of the State courts on the question as to what are the laws of the State is binding upon those of the United States. But the law under consideration has been passed upon by the Supreme Court of Illinois, and held to be invalid. This ought to have been sufficient to govern the court below. * * *.' These principles were reaffirmed in *Post v. Supervisors* (*Amoskeag Bank v. Ottawa*) (105 U. S., 667)."

In *Rawlins v. Georgia* (201 U. S., 639), Mr. Justice Holmes, in delivering the opinion of the court, said:

> "At the argument before us the not uncommon misconception seemed to prevail that the requirement of due process of law took up the special provisions of the State Constitution and laws into the Fourteenth Amendment for the purposes of the case, so that this court would revise the decision of the State court that the local provisions had been complied with. This is a mistake. If the State Consti-

tution and laws as construed by the State court are consistent with the Fourteenth Amendment we can go no further."

In *West v. Louisiana* (194 U. S., 258), Mr. Justice Peckham, in delivering the opinion of the court, said at page 261:

> *"Whether the State Court erred in its construction of the State Constitution and statutes and the common law on the subject of reading depositions of witnesses, is not a Federal question. We are bound by the construction which the State Court gives to its own Constitution and statutes and to the law which may obtain in the State, under circumstances such as those existing herein. Among many of the cases to that effect see Brown* v. *New Jersey* (175 U. S., 172.)"

In *Howard v. Kentucky* (200 U. S., 164), Mr. Justice McKenna, in delivering the opinion of the court, said at pages 172-173:

> "The argument of plaintiff in error is very elaborate, but there is scarcely any phase of it which has not been answered adversely to his contention by decisions of this Court.
>
> He seems to make an issue with the Court of Appeals of the State upon the law of the State, and to contend that the Court erred in the interpretation of that law. This contention encounters the ruling *In Re Converse* (137 U. S., 624, 631), and other cases which hold that a 'State cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction.'
>
> We cannot assume error in the decision of the Court of Appeals. We accept it, as we are bound to do, as a correct exposition of the law of the State — common, statutory and constitutional."

In *Hodge v. Muscatine County* (196 U. S., 276), Mr. Justice Brown, in delivering the oponion of the court, said at page 282:

> "The question is made whether section 5007 violates the Constitution of Iowa in not stating distinctly the tax and the object to which it is to be applied, but as this is purely a local question, we are not called upon to consider it."

In *Telluride Power Transmission Company v. Rio Grande Western Railway Company* (187 U. S., 569), Mr. Justice McKenna, in delivering the opinion of the court, said at page 584:

> "From this excerpt it appears that the Supreme Court construed the statutes and constitution of Utah deciding that the power company had no existence as a corporation in the State, and could acquire, therefore, no rights as such, and 'was not in a position to question the right of the plaintiff (defendant in error) in the premises.' And no independent right was found in Nunn. What was done by him the Court said was done 'for the use and benefit of the defendant company.' And it was decided that he was not 'a personal claimant and owner of the right of way in controversy as against the right of way acquired by respondent (plaintiff in error).' These conclusions did not involve the decision of Federal questions. The first expressed the meaning and effect of local statutes. The second depended upon a finding of fact. Neither, therefore, is reviewable by us." *Writ of error dismissed.*

In *Gulf and Ship Island Railroad Company v. Hewes* (183 U. S., 66), Mr. Justice Brown, in delivering the opinion of the court, said at page 75:

> "This court has repeatedly held that we cannot revise the judgment of the highest court of a State unless, by its terms, or necessary operation, it gives effect to some provision of a state constitution or law which, as thus construed, impairs the obligation of a precedent contract."

In *Mason v. Missouri* (179 U. S., 328), Mr. Justice White, in delivering the opinion of the court, said at page 334:

> "But the State Supreme Court has, in this case, decided that the provision of the state constitution respecting the enactment of registration laws does not limit the power of the general assembly to create more than one class composed of cities having a population in excess of one hundred thousand inhabitants and hence that the Nesbit law was not repugnant to the state constitution. *This conclusion must be accepted by this court.*"

One of the latest utterances of this court upon this question is to be found in *Smith v. Jennings* (206 U. S., 276, Mr. Justice Moody delivering the opinion of the court), wherein it was held that: "Whether proceedings in the enactment of a State statue conform with the State Constitution, is to be determined by the State court, *and its judgment is final.*"

FOURTH POINT.

The six assignments of errors on the part of the plaintiffs in error are none of them well taken.

They are found on pages 109, 110 and 111 of the Record.

Let us proceed to examine them.

(1)

The first is merely formal and presents no definite or specific ground.

(2)

The second is of the same character.

(3)

The third assignment is as follows:

> "That the said Court of Appeals of the State of New York erred in holding and deciding that 'Chap. 240 of the Laws of 1906' which was enacted 'since the argument of the appeal' and 'which in express terms declares the printed copies (of the journals of the Legislature) to be the original journals of the two houses and makes them or copies thereof competent evidence when certified by the respective clerks of the Senate and Assembly' had 'set at rest' any question on the objection 'that the authenticity of the journals of the Legislature, certified copies of which were put in evidence, was not established, and that with the failure of any original record certified extracts therefrom were not competent."

It will appear from printed record (page 38), and again at page 103, that when the certified copy of the extract from the Senate Journal was offered in evidence, no objection was made that there was no original Senate Journal and that the copy produced was not a correct copy, but that the objection was "that the paper offered is incompetent, irrelevant and immaterial; that the *original* Senate Journal, if produced, is not a record either at common law or by statute, and cannot be introduced in evidence, and cannot be resorted to by the court for the purpose either of validating or impeaching any law, and that the legislative law makes the certificates of the presiding officers conclusive evidence as to whether the majority were present or three-fifths, and the conclusive evidence is that there was only a majority present and not three-fifths."

To the offer of the Assembly Journal extract the objection was:

"I make the same objection to that as I did to the copy of the journal of the Senate, and the same objection if the original were produced." (Record, page 39.)

Nowhere in the record does it appear that the objection was taken that these certificates were not authentic, nor that there was no original journal, and it was first found upon the brief of appellants (plaintiffs in error) in the Court of Appeals, which statement must have led the Court of Appeals to use the language quoted in its opinion where it says, "It is contended, however, that the authenticity of the journals of the Legislature, certified copies of which were put in evidence, was not established, and that with the failure of any original record, certified copies were not competent."

As shown by the specific objections made by the appellants, this contention was not made except on the brief.

On the other hand, the language of the objection shows that it was not intended at the time to object to the certified copies *as not being authentic,* or because there were no original journals, as appellants said, "that the *original* Senate Journals if produced" could not be introduced in evidence, so it will be seen that they not only did not question the correctness of the certified copies, did not question the existence of an *original,* but impliedly admitted the existence of such *original,* but claimed that such "original" would not be competent as evidence.

So that the *objection* which the Court of Appeals decided had been "set at rest" by the enactment of chapter 240 of the Laws of 1906 had never been taken or raised by plaintiffs in error, upon the record.

(4)

The fourth assignment of error was:

> "That the said Court of Appeals of the State of New York by its decision *impliedly admitting* that there were no original journals of the Legislature of 1903 in existence, and that the authenticity of the journals, certified copies of which were put in evidence, was not established and that there was a failure of any original record, erred in holding and deciding that Chapter 240 of the Laws of 1906 set at rest the objection raised at the trial, on July 12th, 1904, that the certified extracts from the unauthenticated printed journals, were not competent proof that the requisite constitutional three-fifths of the members of each house were present on the passage of Chapter 41 of the Laws of 1903."

We answer that the Court of Appeals did not, either impliedly or in any other manner, admit "that there were no original journals in existence;" or that "the authenticity of the journals, certified copies of which were put in evidence, was not established;" or that "there was a failure of any original record."

As hereinbefore stated, the Court of Appeals in its opinion stated the question as it appeared in appellants' brief, which was incorrect, but did not express any opinion thereon or decide the same.

Plaintiffs in error also say in this fourth assignment of error that the Court of Appeals "erred in holding and deciding that chapter 240 of the Laws of 1906 set at rest the objection raised at the trial, on July 12, 1904, that the certified extracts from the unauthenticated printed journals were not competent proof that the requisite constitutional three-fifths of the members of each house were present on the passage of chapter 41 of the Laws of 1903."

The Court of Appeals did not by this decision hold or decide that chapter 240 of the Laws of 1906 set at rest the "*objection*" raised at the trial, that the certified extracts from the unauthenticated printed journals were not competent proof, *because in the first place no such objection was made at the trial, and in the second place the court declined to express any opinion upon this subject, which was, moreover, never properly before the court,* and its decision is only to the effect that the question as to the admission of the legislative journals as evidence, had *now* been set at rest for the future by chapter 240 of the Laws of 1906. (See *Matter of Stickney*, 185 N. Y., 107, 108; Record, pages 91, 92.)

(5)

The fifth assignment is as follows:

> "That the said Court of Appeals of the State of New York erred in holding that Chapter 240 of the Laws of 1906 validated the order imposing the tax, although there was no legal evidence in existence at the time the proceedings below were instituted, heard, and determined, that Chapter 41 of the Laws of 1903 had the effect of a valid law at such time." (Record, page 110.)

It is sufficient to say that the Court of Appeals made no such decision. That court simply affirmed the order of the Appellate Division, which itself affirmed the order of the Surrogate's Court which had held that the act of 1903 (chap. 41) imposing the tax was *constitutionally enacted.* The Court of Appeals had previously held in other cases that where the certificates of the presiding officers of both houses were defective in failing to show that the requisite number of members had voted or were present when a bill was passed, that recourse might be had to the journals of the two houses to

establish the due passage of the enactment — that is — to show that in fact the requisite number were present or that the requisite number had voted for the measure. (Record, pages 105, 106.) That point had already been settled by numerous previous decisions, hereinbefore cited. (See latter part of **First Point.**)

(*a*)

That decision (even if it had been erroneous), holding that certain evidence was admissible to establish a concededly material fact, would not necessarily present a Federal question for review in this court.

It is not every error in the admission or exclusion of evidence in a State court which will be reviewed by this court.

> "A State court cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court while acting within its jurisdiction."
>
> *In re Converse,* 137 U. S., 624.

> "When the Legislature of a State enacts laws for the government of its courts while exercising their respective jurisdictions, which, if followed, will furnish parties the necessary constitutional protection of life, liberty and property, it has performed its constitutional duty; and if one of its courts, acting within its jurisdiction, makes an erroneous decision in in this respect, the State cannot be deemed guilty of violating the constitutional provision that no State shall deprive a person of life, liberty or property without due process of law."
>
> *Arrowsmith v. Harmoning,* 118 U. S., 194.

> "The essential elements of due process of law are notice and an opportunity to be heard

> * * * The due process clause in the Fourteenth Amendment *does not necessitate that the proceedings in a State court should be by a particular mode.* * * *"*
>
> *Simon v. Craft,* 182 U. S., 427.

(*b*)

Here the plaintiffs in error were heard against the validity of the enactment in question before the appraiser, the Surrogate's Court, the Appellate Division of the Supreme Court and in the Court of Appeals; and were also heard upon a printed brief on a motion for a rear[illegible]ment in the latter court. (Record, page 94, fol. 147.)

It cannot, therefore, be successfully urged that the plaintiffs in error have not had the full advantage of "due process of law" in all the courts of the State.

> "When a plaintiff below has the benefit of a full and fair trial in the several courts of his own State, whose jurisdiction he invokes, and where his rights are measured, **not by laws made to affect him individually,** but by **general provisions of law applicable to all in like condition,** even if he can be regarded as deprived of his property by an adverse result, the proceedings that so resulted were 'in due process of law' as that phrase is used in the Fifth and Fourteenth Amendments to the Constitution."
>
> *Marchant v. Penn. Railroad Co.,* 153 U. S., 380.

(*c*)

Had the journals themselves been produced they would have been admissible to establish the due passage of the act of 1903, not only under the various decisions of the highest court of New York, but under the decisions of this court. The journals were admissible — not for the purpose of impeach-

tion" no opinion was in fact expressed by the Court of Appeals.

That court did not decide that any new or additional legislation was necessary to authorize the admission in evidence of certified copies of the journals. It simply said, in substance, that upon such "contention" of the plaintiffs in error it expressed no opinion, but that "the question" has "*now* been *set at rest*" by the enactment of a statute which "in express terms" authorized the admission of certified copies of the journals in evidence. That was not an admission that the journals had previously been improperly admitted.

(*f*)

It is evident that the Court of Appeals affirmed the decision of the lower courts because it regarded that the clerks' certificates of the due passage of the Act of 1903 had been properly admitted in evidence in accordance with then existing law. Its omission to express an opinion upon the "contention" as to the necessity of further evidence of the "authenticity" of the journals was in effect a denial of any such necessity therefor; and its mere allusion to the fact of the legislation of 1906 having set at rest the question, was intended to excuse its omission to decide what was in fact a mere academic question. Besides the expression must have had reference only to the future.

Whether the Act of 1906 was applicable to sustain the admission of the clerks' certificates of 1904, is of no consequence, provided they were properly admitted under the provisions of law concededly in existence in 1904. Their admission being proper, it matters not even if a wrong reason may have been given for the decision. There is therefore no Federal question of "due process of law" involved in this case.

(6)

The sixth assignment of error is as follows:

> "That the said Court of Appeals of the State of New York erred in holding and deciding that the motion for reargument and for a hearing on the validity and effect of Chapter 240 of the Laws of 1906 should be denied; by reason of which denial the said Court of Appeals has, in *effect*, held:
>
> (a) that Chapter 240 of the Laws of 1906 should be construed to have a retroactive effect, and
>
> (b) that such construction would not be in violation of the Fourteenth Article of the Amendments to the Constitution of the United States, and
>
> (c) would not impose and exact a tax without due notice and due process of law, and
>
> (d) that the State would not by such act and such construction thereof deprive the plaintiffs in error of property without due notice and due process of law; each of these grounds having been stated in the notice of said motion by the plaintiffs in error who then and there insisted upon their constitutional rights in such respects as soon as the occasion arose." (Record, page 110, fol. 178.)

In considering the above sixth assignment of error we insist that the mere denial of the motion for a reargument did not have any such "effect" as above described and urged by the plaintiffs in error. It simply refused a *second oral* argument before the Court of Appeals.

We insist that the question of a reargument in that court was a matter entirely within the discretion of that court and cannot be reviewed here or elsewhere.

A defeated litigant in that court has a *right* to make a motion for a reargument, but the granting of such a motion is purely discretionary.

(*a*)

If such a question was reviewable here we might also well insist that the plaintiffs in error have practically had a reargument in the Court of Appeals; not an *oral* reargument, it is true, but a reargument or further consideration on a printed brief.

The practice of that court in this regard is regulated by Rule XX, which is as follows:

> "Motions for reargument must be submitted on printed briefs without oral argument, on notice to the adverse party, stating briefly the ground upon which a reargument is asked and the points supposed to have been overlooked or misapprehended by the Court, with proper reference to the particular portion of the case and to the authorities relied upon."

From this rule it will be seen that what is called a motion for a reargument is practically a reargument upon printed briefs, and as will be seen from the brief of plaintiffs in error (Record, pages 96-98), all the grounds upon which they relied for a reversal were presented to the court.

A motion for a reargument under this practice is a printed argument asking for an oral argument.

An examination of the grounds stated in the assignments of errors by plaintiffs in error will show that they are only criticisms of the decision of the Court of Appeals, and that no question of the violation of the Constitution of the United States is presented or raised thereby.

(*b*)

Besides there is no constitutional right to an oral argument in either the Court of Appeals or in this court.

A motion for a reargument was in fact entertained by the Court of Appeals and denied without opinion. (*In the Matter of the Estate of Joseph Stickney*, 185 N. Y., 597.)

It is settled law in the State of New York that the question whether a reargument should be permitted is exclusively for the court in which it is pending to determine.

Fleischman v. Stern, 90 N. Y., 110, 113.
Matter of Grout, 83 Hun (N. Y.), 25.

(*c*)

To the claim of the plaintiffs in error here that chapter 240 of the Laws of 1906 cannot be invoked by the defendant in error to sustain the admission of the clerks' certificates showing the due enactment of the Tax Law of 1903 because it was passed subsequently to 1903 and would be retroactive, we might answer, if it were necessary, that the Fourteenth Amendment contains no prohibition of retrospective legislation *as such* (except such as is technically *ex post facto* or such as impairs the obligation of contracts), and therefore, now, as before, the mere fact that a statute is retroactive in its operations does not necessarily make it repugnant to the Federal Constitution.

League v. Texas, 184 U. S., 156.

But the defendant in error insists that the question of the effect of the act of 1906 is only an academic one, because he has never claimed in the State courts, and does not now claim, anything under that act in this action.

This court has held that a State statute reducing the rate of interest upon all judgments obtained

within the courts of a State, does not when applied to one obtained previous to its passage deprive a creditor of his property without due process of law.

Morley v. Lake Shore R. Co., 146 U. S., 162.

We might, if necessary, invoke the application of that principle here, where simply a rule of evidence was involved, which was properly determinable by the State court, and presents no question for review in this court.

(*d*)

We might cite the decision in *Watson et al. v. Mercer* (8 Peters, 88, 110), wherein it was held that:

> "The Constitution of the United States does not prohibit the states from passing retrospective laws generally; but only *ex post facto laws*,"

which phrase is not applicable to civil laws, but to penal and criminal laws.

Miller on the Constitution, pages 536-538.

(*e*)

The true rule is this — that matters of procedure are entirely within the control of the States, and a regular proceeding in a State court, acting within its jurisdiction, and under a valid State statute, is "due process of law," even though the court err in the administration of the law.

Lent v. Tillson, 140 U. S., 316.
Backus v. Fort St. Union Depot Co., 169 U. S., 557.
Central Land Co. v. Laidley, 159 U. S., 103.

Here there is no claim that there is any State law which deprived the plaintiffs in error of any property without "due process of law," but only that there was an erroneous decision of the State court in the regular course of judicial procedure in the mere application or interpretation of a concededly valid State statute. Plaintiffs in error having been duly and regularly heard before the State court upon that question are now without remedy in this court.

FIFTH POINT.

The alleged Federal question was presented too late. It was not raised until after the decision of the highest Court of the State affirming the orders of the lower Courts, and was only suggested on the petition or motion for a rehearing in the Court of Appeals.

The authorities hold that under such circumstances the alleged Federal question will not be entertained in this court.

Bushnell v. Crooke Mining Co., 148 U. S., 682.
Pim v. St. Louis, 165 U. S., 273.
Turner v. Richardson, 180 U. S., 87.
Susquehanna, etc., v. W. Branch Broom Co., 110 U. S., 57.
Miller v. Cornwall Railroad Co., 168 U. S., 131.
Scudder v. Comptroller, etc., 175 U. S., 32.

The motion for a reargument in the Court of Appeals was denied without an opinion. (*Matter*

of Stickney, 185 N. Y., 597.) Its denial was a matter of discretion and cannot be reviewed in this court.

(a)

"Where the Federal question is not raised until the petition for rehearing to the highest court of the State, it is too late to give this court jurisdiction, *unless the court grants the rehearing and then proceeds to pass upon the question.*"

McMillen v. Ferrum Mining Company, 197-U. S., 343.

Here the petition or motion for a rehearing was not granted but was denied and the court did not pass upon any Federal question. (Record, fol. 147.)

"It is too late to raise Federal questions on petition for rehearing to the highest court of the State *unless the petition is entertained and the point passed on.*"

French v. Taylor, 199 U. S., 274.

Neither the petition for a rehearing nor the assignments of error herein, constitute strictly a part of the record. "They form no part of the record on which it is to be ascertained whether the State court decided a Federal question."

(Id.) per Chief Justice Fuller, page 279.

SIXTH POINT.

The Court of Appeals having held in this very case "that where the Session Law show a statute to have been passed but the certificates of the presiding officers of both houses attached to the original bill are defective in failing to show that the requisite number of members were present or voted therefor, recourse may be had to the journals of the two houses to support the validity of the enactment" its decision must be regarded as conclusive as to the law upon that subject in the State of New York; and that determination will not be disturbed by this Court.

That decision was made in this case. (Record, page 91, fol. 143.) Nevertheless the plaintiffs in error now seek, at pages 21 and 22 of their brief, to claim that it should not be respected simply because in the previous decision to that effect in 148 N. Y., 540, it was not strictly necessary to the decision and rather *obiter*. It is sufficient that the doctrine has been actually held by this court. That it may have been somewhat *obiter* only affects its *weight*. It is, however, conclusive so far as *this case* is concerned.

(It is entirely immaterial that a different rule applies to acts of CONGRESS as held by this court in *Field v. Clark* (143 U. S., 649). It is the province of the courts of the United States to determine as to the due enactment of Federal laws; while State courts determine as to the constitutional enactment of State laws. The dispute in *Field v. Clark* was in relation to a portion of the *contents*

of the act of Congress and not in relation to the question as to whether the act was *in fact enacted,* which is the point here raised by the plaintiffs in error.)

LET US NOW PROCEED TO AN EXAMINATION AND DISCUSSION OF THE BRIEF OF THE PLAINTIFFS IN ERROR.

A

As to the First Point in the brief of the plaintiffs in error.

It is found on page 19 of their brief. It is in substance that the act of 1903 would not have been declared to be a law, without recourse to the journals.

No one disputes that proposition.

The certificates of the presiding officers of the two houses were defective in that they did not show that the act was passed in the presence of three-fifths of each house. The Constitution of the State (§ 25 of article 3) requiring journals of each house to be kept upon which the yeas and nays are to be entered on the passage of bills of this character, *the presumption was that such journals were kept,* and that their production **or the production of certified copies thereof** would show whether or not the act was duly passed in the presence of three-fifths of the members of each house.

THE CONSTITUTION NECESSARILY MAKES SUCH JOURNALS EVIDENCE OF THE DUE PASSAGE OF BILLS. THE CONSTITUTION OF A STATE IS THE FUNDAMENTAL **law** OF THE STATE.

Church v. Kelsey, 121 U. S., 282-4.
McKoan v. Devries, 3 Barb., 196.

The original journals could be produced and identified, or else certified copies could be produced under the provisions of section 933 of the New York Code of Civil Procedure. The latter course was followed. Recourse was thus duly had to the journals.

This was the view properly and unanimously taken by the Appellate Division of the First Department, Judge Laughlin writing the opinion, wherein it was held that as the certified copies of the journals of the Senate and Assembly showed that the bill was duly passed by more than a majority vote and in the presence of more than three-fifths of all the members elected to each house, the statute was duly enacted and is valid. (Record, page 88.)

Of course, the production of *certified copies* of the journals showing the due enactment of the act of 1903 was a "recourse to the journals of the two houses," and that without such recourse the said act would not have been shown to have become a law.

B

As to Point II in the brief of the plaintiffs in error, at page 21 thereof.

Their point seems to be this — that although the Court of Appeals has held not only in this case, but in other cases, that "where the Session Laws show a statute to have been passed but the certificates of the presiding officers of both houses attached to the original bill are defective in failing to show that the requisite number of members were present or voted therefor, recourse may be had to the journals of the two houses to support the validity of the enactment," yet the plaintiffs in error claim that

"this portion of the decision is in no respect decisive of the case or of our (their) objections."

This is mere quibbling. We submit that the Court of Appeals must be permitted in its own way to state what it had previously decided on the subject of the right of having recourse to the journals of the two houses to establish the validity of the passage of a law. Whether what if said in 148 N. Y., 540, on that subject was absolutely essential to the decision of that case is unimportant now, as it only affects the *weight* of the authority of that case.

Besides the right to have recourse to the journals had been several times previously decided by the highest court of the State. (*See cases cited at the end of our First Point.*)

In addition, the learned Appellate Division of the First Department (per Laughlin, J.) expressly held that the certification of the fact that a majority vote for the bill is not conclusive that three-fifths were not present and that "the fact may be shown by the journals." (Record, pages 87-8, fol. 135.)

It is immaterial so far as this case is concerned what may be the rule on this subject in other jurisdictions, as this court will respect the decision of the highest court of New York, and will not disturb that decision in this case.

The plaintiffs in error under their second point go outside of the record and on page 21 assert that "on producing such original journals in the Court of Appeals they were shown to be unauthenticated." There is nothing in the record showing that the original journals were produced in the Court of Appeals or that they were shown to be unauthenticated. The statement is wholly unjustifiable — if not worse. It must be disregarded. The learned

counsel for the plaintiffs in error knows, or ought to know, that such references to matters not contained in the record itself, tend to discredit all his other references to the record. We may be permitted to use such statement, however, as an *admission* that there were "original journals." If they were in fact "original journals" then, of course, they did not need to be "authenticated." "Authentication" is defined in *Rapalje & Lawrence's Law Dictionary* as *"Attestation or certification: Thus, a document or record is said to be authenticated when it is properly attested or certified by an authorized person, so as to be admissible in evidence in the courts."*

"Original" journals do not need to be thus authenticated. When shown by witnesses having knowledge of the fact that they *are* the originals, they are rendered admissible in evidence. In the absence of such witnesses they should of course be authenticated. A certified copy made pursuant to statute is itself an "authentication." Such certified copies of the journals were produced here by the defendant in error and were introduced in evidence on the hearing before the appraiser. (Comptroller's Exhibits, Nos. 2 and 3, Record, fols. 94, 95.) They showed the due passage in each house of the statute of 1903, in the presence of three-fifths of the membership.

Under the same second point and on page 23 of the brief of the plaintiffs in error, it is asserted that "Having reference to rules of evidence, the original *manuscript* minutes of proceedings made by the clerks would be the best evidence and the only journals contemplated by the Constitution."

We answer that there is no legal authority for that statement. None is produced or cited. There is no statute in the State of New York which declares that the original "*manuscript*" minutes are

"the best evidence," much less that they are the "*only*" evidence of "the journals contemplated by the Constitution." It is clear that in the absence of any statute declaring in what manner, style, or form, whether in writing, print, or otherwise the journals shall be kept, then *any* manner satisfactory to the Legislature answers every constitutional purpose. It is a question to be determined by the Legislature and cannot be arbitrarily controlled by the courts. The Legislature at its own discretion can keep its journals in manuscript, or in print, or in woodcuts, or marble tablets, if it desires to do so, and no constitutional provision would be violated.

C

As to Point III in the brief of the plaintiffs in error, at page 27.

It seems to be devoted to an exposition on pages 27, 28 of matters not contained in the record herein, and particularly as to a certain alleged "statement and *invitation*" said to have been contained in their brief used before the Court of Appeals of New York; and (on page 31) as to the production *on the argument in the said Court of Appeals* at the request of the plaintiffs in error of the "original journals" *by the clerks of the Senate and Assembly* from which Exhibits 2 and 3, placed in evidence by the defendant in error (at fols. 94, 95 of the Record) were extracts. Then follows a statement (on page 31) that "These journals were printed books and were *exhibited to the court* for the purpose of showing that they were unauthenticated and were inspected by the court. Then follows a "Note" as to what the counsel for the plaintiffs in error stated to the Court of Appeals, and also as to what "was manifest from an inspection of the book," etc., etc.

We respectfully submit to this court that all these extraneous matters not appearing in the record but irregularly injected into the brief of the plaintiffs in error, relating to subjects which, if proper to be considered at all in the decision of this case, should have been placed in the record by amendment thereof on motion or otherwise, where the defendant in error could refute the same; and we insist that such matters cannot now be considered by this court in the decision of this writ of error.

D

As to Point IV in the brief of the plaintiffs in error,

It is this — "The legislation" (meaning, of course, the legislation of 1906) "as construed, used and applied by the *Court of Appeals* to this case, is not due process of law."

There is then no claim that either the Surrogate's Court or the Appellate Division has "construed, used and applied" the act of 1906 in violation of due process of law.

THEREFORE IT MUST BE CONCEDED THAT IF THE COURT OF APPEALS HAD SIMPLY AFFIRMED THE ORDERS OF THE LOWER COURTS, WITHOUT OPINION, THIS COURT WOULD HAVE NO JURISDICTION TO REVIEW ITS DECISION ON WRIT OF ERROR.

We submit that the Court of Appeals did practically nothing more than that.

What was the exact situation?

The appraiser acting under the law of 1903 had assessed upon the Stickney estate the tax in question; that decision had been affirmed both by the

Surrogate's Court and the Appellate Division. Practically the only question involved was whether the tax act of 1903 had been shown to have been duly enacted.

That was done by the production of certified copies of the journals of the two houses, which copies were admitted in evidence and marked Comptroller's Exhibits 2 and 3. (Record, pages 39, 61, 62.)

If these exhibits were legally admissible, the Comptroller's case was then complete and the act of 1903 was shown to have been duly enacted.

THOSE EXHIBITS WERE DULY CERTIFIED UNDER THE PROVISIONS OF SECTION 933 OF THE CODE OF CIVIL PROCEDURE, AND WERE THEREFORE LEGALLY ADMISSIBLE.

Whatever objections were intended to be made to those records should have been made when they were offered.

We desire to impress upon this court the important fact that the plaintiffs in error did not object upon the ground that there were no original journals, but the objection was simply that the evidence was "incompetent, irrelevant and immaterial," and further that the "original Senate journal, *if produced,* is not a record either at common law or by statute," and further "that the Legislative Law makes the certificates of the presiding officers *conclusive* evidence as to whether the majority were present or three-fifths." (Record, pages 38, 39.)

The Comptroller was not bound to prove as an affirmative fact that there were "original journals" when no such objection was interposed. The specific objections made excluded the necessity of supplying proof as to others not made.

The plaintiffs in error could not raise any new or additional objections on the argument in the Court of Appeals, where the defendant in error had no opportunity to supply other or additional proof. The objection made before the appraiser was not "that the authenticity of the journals of the Legislature was not established." That suggestion or objection was an afterthought and made, if at all, before the Court of Appeals.

The specific objection "that the original journal, if produced, is not a record either at common law or by statute" was an assumption or admission of the existence of "original journals," while the absence of any distinct objection to the "authenticity" of the journals was a waiver of the necessity of supplying any evidence thereof.

Besides the clerk of the Assembly and the secretary of the Senate under their respective hands and official seals certified (under the authority expressly conferred by section 933 of the Code) that they had compared the extracts appended with the "original" journals on file in their respective offices and that the same were correct and true copies thereof. (Record, pages 61, 62; Comptroller's Exhibits, Nos. 2 and 3.)

Those certificates were themselves sufficient evidence of the existence of "original" journals and of the "authenticity" of the extracts therefrom appended to such certificates; especially in the absence of any objection that there were no "original journals," and placing the objection to the admission of the certified copies on other and distinct grounds which were clearly untenable.

The rule is the same both in the State and Federal courts that where certain objections are made to the admission of testimony, afterwards on a re-

view of the case the objecting party is confined to the objections specifically taken on the trial.

Stebbins v. Duncan, 108 U. S., 32, 46.
Burton v. Driggs, 20 Wallace, 125.
Hinde's Lessee v. Longworth, 11 Wheat., 199.
Cary v. White, 59 N. Y., 336.
Mackinstry v. Smith, 16 Misc. (N. Y.), 351.
Hunter v. Walter, 12 N. Y. Supp., 60 (affirmed 128 N. Y., 668).
Ward v. Kilpatrick, 85 N. Y., 413.
Phillips v. Met. El. Co., 12 App. Div. (N. Y.), 283-4.

Objections to a record that it was not properly *authenticated,* must be raised at the trial court and cannot be entertained in this court for the first time.

Carpenter v. Strange, 141 U. S., 87.

There is no claim or pretense on the part of the plaintiffs in error that any Federal question had arisen in this case prior to the hearing in the Court of Appeals.

And rejecting, as we must, the irrelevant matter improperly, if not unprofessionally, injected into the brief of the plaintiffs in error as to what occurred during the argument before that court (none of which is contained in the record herein) then there nothing remains upon which to predicate a Federal question, unless it is contained in the decision itself, which it was not.

What was that decision? In substance and effect it was simply an affirmance of the decision of the courts below. In the first place the opinion of that court (per curiam) simply declared that the court had previously held that where the Session

Laws show a statute to have been passed, but the certificates of the presiding officers of both houses attached to the original bill are defective in failing to show that the requisite number of members were present or voted therefor, recourse might be had to the journals of the two houses to support the validity of the enactment. (Record, page 91.) This court will respect that statement and regard it as conclusive as to what the Court of Appeals had actually decided.

Then it is further stated in the opinion (Record, page 91) that "An appeal to those journals shows that when the statute now under review, the enactment of which is challenged, was passed, there was present in each house of the Legislature the requisite constitutional number of members, to wit, three-fifths." (Id.)

That being so it followed as a matter of course that the statute was constitutionally enacted, and the order appealed from was entitled to be affirmed. But the court courteously and unnecessarily went out of its way to state the "contention" or "objection" of the plaintiffs in error. It said: "It is *contended*, however, that the authenticity of the journals of the Legislature * * * was not established, and that with the failure of any original record, certified extracts therefrom were not competent."

When and where and by whom was it "contended" that the "authenticity" of the journals had not been established?

Was such contention made in the Court of Appeals? If so it came too late, because whatever objection existed to the introduction of certified copies of the journals should have been made when they were offered and permitted to be introduced on the regular hearing before the appraiser; but

no such objection was then made. (See Record, pages 38 and 39.) The plaintiffs in error must be confined to the objections they first made. If certified copies were not competent to establish the authenticity of the journals, that distinct objection should have been made, but none such was interposed at the hearing; while the only objection made to the introduction of the certified copies was that they were "incompetent, irrelevant and immaterial," and that *if* the original journals *were* produced they were not a record either at common law or by statute. (Record, pages 38, 39.)

The Court of Appeals, while courteously stating the "contention" of the plaintiffs in error, did not "express any opinion" on this "objection" as it was then called, which amounted in *substance and effect* to overruling the same, which overruling should have been promptly made without dignifying such belated "contention" or "objection" by any further consideration. And probably as a reason for the failure to express an opinion on such "contention" or "objection," the court contented itself with saying that "the question" involved in such "contention" or "objection," to wit, the question of the printed copies being deemed original journals, etc., has been "set at rest" by the enactment of the act of 1906. (Record, page 92.)

We submit that in the brief reference to the act of 1906 in the "*Per Curiam*" memoranda of the Court of Appeals it was not intended by that court to hold that the act of 1906 had necessarily determined *this case*, but rather that it had excused or justified that court in not expressing any opinion on the "contention" or "objection" which had been raised by the plaintiffs in error *somewhere* — probably on the argument in the Court of Appeals; and that what had been "set at rest" (not for this case but for the future) was such objections and

not the questions which the court had already and necessarily passed upon in reaching the conclusion to affirm the order herein.

In other words, the reasonable construction of that decision is that the act of 1906 had "set at rest" for the future any further question or objection or contention that might hereafter arise as to whether *printed* journals could be regarded as "original" journals for the purpose of establishing the fact that a statute has been constitutionally enacted notwithstanding the defective certificates of the presiding officers of the two houses. The act of 1906 was neither "construed, used nor applied" to validate the enactment of the act of 1903. The court had already held that the journals before the court, which had been put in evidence through certified copies thereof (to which no objection except that of incompetency, irrelevancy and immateriality had been interposed, and except the further objection that *if* the original journals were produced they were not records either at common law or by statute [Record, page 38]), had conclusively shown that there had been present the requisite constitutional number, to wit, three-fifths of each house; and it necessarily followed therefrom that the act of 1903 had been constitutionally enacted.

The subsequent language of the opinion as to what the court might thereafter hold on the contention or assumption of the plaintiffs in error that the authenticity of the journals was not established and as to whether thereafter certified copies would be competent on the failure of any original record, the court very properly declined to express any opinion on any such supposed case which was not likely to arise, because the "question" as to the admission of such journals had been set at rest (not in this case but for the future) by the enactment of the act of 1906 declaring printed copies to

be original journals, and making certified copies thereof competent evidence.

The reference to the act of 1906 was not in vindication or justification of the decision already made, but simply in explanation of the refusal of the court to decide hypothetical questions not then pending which had been provided for in the future by the statute of 1906. In other words, the decision actually made was in substance and effect a mere affirmance of the order appealed from, with a refusal to decide as to other questions which might arise on somewhat different facts which the statute of 1906 was supposed to provide for.

We reiterate that the Court of Appeals never intended to use the statute of 1906 in any manner to sustain its affirmance of the order appealed from in this case. The statute of 1906 is not in its terms retroactive; it has never been applied retroactively by that learned court, and there is, therefore, no *bona fide* question of "due process of law" in this case.

E

As to Point V in the brief of plaintiffs in error.

The headnote is simply this — "This Court has Jurisdiction."

We answer that the jurisdiction of this court depends upon whether there is any question of "due process of law" actually involved herein. We insist that there is none, and we are sustained by the record.

A Federal question cannot be injected into a case simply because the exigencies of an appellant require one.

The Court of Appeals evidently has never regarded as serious the claim of the plaintiffs in error

that any question of "due process of law" was involved herein. It generously allowed them after the appeal had been decided in that court and after reference had been made to the statute of 1906 in its opinion, to annex to the remittitur herein their motion papers and brief used on the motion for a reargument in the Court of Appeals. (Record, fols. 146, 147, 151, 154.) And thereafter the court, with full knowledge of what was claimed by the plaintiffs in error in regard to the violation of the Fourteenth Amendment as to "due process of law," denied the motion for reargument *without opinion*, believing the case for affirmance so plain as not to require explanation or elucidation. The fact that the Court of Appeals in simply denying the motion for a reargument without opinion did not disclaim its intention to violate the Fourteenth Amendment, is of no consequence. It is sufficient, and absolutely decisive of this case, that the statute of 1906 was neither construed, used nor applied retroactively,— that it is not by its terms retroactive, and that the defendant in error claims no advantage or benefit from that statute to uphold the decision of the Court of Appeals, and it conclusively appears that it was only incidentally mentioned by that court as a reason why it was unnecessary to express an opinion in regard to the "contention" of the plaintiffs in error concerning a situation or state of facts not then before the court.

The trial court had admitted certified copies of the journals of 1903, to which admission there had only been interposed certain untenable objections. This court will not assume to review that ruling, as it is the ruling of the highest court of a state in regard to the constitutional enactment of a State law and is conclusive upon this court as its own repeated decisions bear witness. (See authorities cited in our Third Point, *supra.*)

But it seems that it was contended that the *authenticity* of the journals was not established, and that with the failure of any original records, certified extracts therefrom were not competent. No such contention, however, was taken at the hearing. (Record, page 38.) It was too late to raise that objection subsequently. The Court of Appeals was not required to pass upon such a question for the benefit of future cases. It properly declined to express any opinion upon that "contention" of the plaintiffs in error then for the first time raised. The reason it gave was that the statute of 1906 just passed would set at rest that question. That statute covered future cases. It was not claimed to cover the present case and was not so held.

It seems preposterous to claim that such casual allusion to a recent statute as settling for the future a new question not raised before the trial court and not involved in the appeal then pending, and from which statute no benefit was claimed so far as the present case was concerned, constitutes a denial of "due process of law."

The whole pretense of the plaintiffs in error herein that "due process of law" has been withheld or violated in this case, is —

"MUCH ADO ABOUT NOTHING."

SEVENTH POINT.

The plaintiffs in error herein in their effort to avoid the payment of a just and reasonable tax for the support of the State government, are invoking the flimsiest technicalities in order to inject into the case a question of "due process of law" which is really not involved herein.

It is respectfully submitted that we have demonstrated that the provisions of the Fourteenth Amendment have not been either intentionally, inadvertently or otherwise violated.

It follows that the order of the State Court should be affirmed.

DAVID B. HILL,
Counsel for Defendant in Error.

STICKNEY v. KELSEY, COMPTROLLER OF THE STATE OF NEW YORK.

ERROR TO THE SURROGATES' COURT IN AND FOR THE COUNTY OF NEW YORK, STATE OF NEW YORK.

No. 196. Submitted March 20, 1908.—Decided April 6, 1908.

A ruling by the highest court of the State sustaining the method of proving the existence of a law of that State presents no Federal question.

Where the language of the appellate court is ambiguous, if it may be taken as a declination to pass upon a question not necessary to the decision, this court will not, in order to aid a technical and non-meritorious defense, spell out a Federal question; but it will resolve the ambiguity against the plaintiff in error who is bound, in order to give this court jurisdiction, to clearly show that a Federal right has been impaired.

Writ of error to review 185 N. Y. 107, dismissed.

THE facts are stated in the opinion.

Mr. Edward Mitchell for plaintiffs in error.

Mr. David B. Hill for defendant in error.

MR. JUSTICE MOODY delivered the opinion of the court.

This is a writ of error to a Surrogates' Court of the State of New York. The judgment brought under review was entered in obedience to a judgment of the Court of Appeals of that State. The judgmen' imposed a transfer tax upon certain real property devised by the will of Joseph Stickney, deceased. The tax was properly assessed if an act purporting to be passed on March 16, 1903, 1 Session Laws of 1903, p. 165, was a duly enacted law of the State. It appears that, by the constitution of the State, laws of the nature of this one require for their due enactment a majority vote in each legislative chamber when three-fifths of the members are present. The presiding officers of both branches of the legislature, in certifying that this bill was duly passed by a majority vote, failed to certify that three-fifths of the members were then present.

The defendant in error was permitted, over the objection of the plaintiffs in error, to prove that the journals of the two houses showed that the requisite number of members were, in point of fact, present. This the Court of Appeals held to be sufficient to show that the statute was validly enacted. The first five assignments of error in this court simply allege in various forms that the Court of Appeals erred in its decision of the cause. These assignments may be summarily overruled upon the plain ground that they present no Federal question. It must not, however, be understood that we intimate that any form of assignment would have given this court the authority to review the determination of the highest court of a State of the proper method of proving the existence of its own laws. *Town of South Ottawa* v. *Perkins*, 94 U. S. 260; *Railroad Co.* v. *Georgia*, 98 U. S. 359; *Post* v. *Supervisors*, 105 U. S. 667; *In re Duncan*, 139 U. S. 449; *Wilkes County* v. *Coler*, 180 U. S. 506.

There is, however, a sixth assignment of error. For its understanding it is necessary to make a further statement of facts. When certified copies of the journals of the two houses were offered in evidence, for the purpose of showing that at the time of the passage of the bill three-fifths of the members were in fact present, notwithstanding the omission of the presiding officers to certify to their presence, counsel for plaintiffs in error made the following objection: "I object on the ground that the paper offered is incompetent, irrelevant and immaterial; that the original journal, if produced, is not a record either at common law or by the statute, and cannot be introduced in evidence, and cannot be resorted to by the court for the purpose of either validating or impeaching any law, and that the legislative law makes the certificates of the presiding officers conclusive evidence as to whether the majority were present or three-fifths, and the conclusive evidence is that there was only a majority present and not three-fifths." The objection was overruled, the evidence was admitted, and an exception was taken. It will be observed that no objec-

tion was taken that the original journals were not produced, but only that if produced they were not admissible to add to or vary the certificates of the presiding officers, which were conclusive as to the numbers present. The judgment of the Surrogate, which was in writing, and of the Appellate Division of the Supreme Court, proceeded upon this view of the objection, and treated the question exactly as if the original journals had been offered. But the judgment of the Court of Appeals indicates that there it was objected, for the first time as far as the record discloses, that the original journals were not produced and that the certified copies were not competent evidence of their contents. The inference that such a question was raised can only be drawn from the concluding part of the opinion. After deciding that the presence of the requisite number of members could be proved by recourse to the journals, and that the journals showed the fact, the court said: "It is contended, however, that the authenticity of the journals of the Legislature, certified copies of which were put in evidence, was not established, and that with the failure of any original record certified extracts therefrom were not competent. Without expressing any opinion on this objection, it is sufficient to say that the question has now been set at rest by the enactment, since the argument of the appeal, of Chapter 240 of the Laws of 1906, p. 471, which in express terms declares the printed copies to be the original journals of the two houses, and makes them, or copies thereof, competent evidence when certified by the respective clerks of the Senate and Assembly." A motion for rehearing was made and denied. Based upon this part of the opinion, a supposed Federal question is alleged in the sixth assignment of error in this court, which is as follows:

"VI. That the said Court of Appeals of the State of New York erred in holding and deciding that the motion for reargument and for a hearing on the validity and effect of Chapter 240 of the Laws of 1906 should be denied; by reason of which denial the said Court of Appeals has, in effect, held:

"(*a*) that Chapter 240 of the Laws of 1906 should be construed to have a retroactive effect, and

"(*b*) that such construction would not be in violation of the Fourteenth Article of the Amendments to the Constitution of the United States and,

"(*c*) would not impose and exact a tax without due notice and without due process of law, and

"(*d*) that the State would not by such act and such construction thereof deprive the plaintiffs in error of property without due notice and without due process of law; each of these grounds having been stated in the notice of said motion by the plaintiffs in error, who then and there insisted upon their constitutional rights in such respects as soon as the occasion arose."

We do not intend to intimate that, if the words of the opinion were capable of the meaning which is attributed to them in this assignment of error, there would have been shown any violation of the Fourteenth Amendment. *League* v. *Texas*, 184 U. S. 156. But we think, in view of the fact that when the copies of the journals were offered in evidence no objection had been made that the originals were not produced, the language of the court may quite as naturally be interpreted as a declination to pass on a question, not necessary to the decision, which had been set at rest for the future by legislation. The best that can be said for the plaintiffs in error is that the action of the court was ambiguous. We resolve the ambiguity against the parties complaining, who are bound to show clearly that a Federal right was impaired, rather than misuse our ingenuity to spell out a Federal question to aid a defense which is merely technical and destitute of substantial merit.

It does not therefore appear that the judgment under review was based upon the decision of any Federal question. *Bachtel* v. *Wilson*, 204 U. S. 36.

The writ of error is

Dismissed.